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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 750

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

MARK W. NORMAN
CYRIL COLEMAN
WILLIAM H. TIMBERS
Attorneys for Petitioner
One Atlantic Street
Stamford, Connecticut

CUMMINGS & LOCKWOOD
Stamford, Connecticut
Of Counsel

April 25, 1949.

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IN THE

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No.

AMERICAN SURETY COMPANY OF NEW YORK,
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, American Surety Company of New York, defendant in the above action, respectfully prays for the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit to review a judgment of that Court, entered January 25, 1949, affirming, by a divided Court, a judgment of the United States District Court for the District of Connecticut, entered February 16,

1948, as modified by a judgment of the said District Court, entered April 24, 1948, which judgment awarded the sum of $3,865.97, with interest, to the United States of America as plaintiff in this action upon a bond conditioned upon the faithful performance of duties by a postal employee.

SUMMARY STATEMENT OF MATTER INVOLVED

Summary of the Facts

The facts were not disputed (R. 7-9)*. The surety bond in question (R. 10) was on a form prescribed by the Post Office Department for more than fifty years. It was given pursuant to statutory law and postal regulations to secure the faithful performance of duties by one William H. Welge, a clerk in the Post Office at Essex, Connecticut. This bond ran for the term of service of Welge, in accordance with 6 U. S. C. A. § 3, which provides that "* * * The liability of the principal and sureties on all official bonds shall continue and cover the period of service ensuing until the appointment and qualification of the successor of the principal.* * *"

The bond was dated October 26, 1935. It was in the penal sum of $2,000. The only reference to premium contained in the bond is the following (R. 10):

> "The premium of this bond is $0.65 per $1,000. The amount of premium charged for a like bond during the year 1908 was $2.00 per $1,000. Total premium charged $1.30."

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*All references in this Petition and in the accompanying Brief to the Record are to printed page numbers thereof, unless otherwise indicated.

This is surplusage insofar as the condition of the bond is concerned, being merely the "certificate" which Postal Laws and Regulations § 71 (5) requires shall appear *on* the bond. The bond is the same form required when personal sureties are offered (Postal Laws and Regulations § 71 (2); *Ex parte Marrin,* 164 Fed. 631 (E. D. N. Y. 1908)).

Welge paid the certified premium for each of the years 1935 through 1944. On November 27, 1944 it was discovered that he had been guilty of a series of embezzlements aggregating $7,949.72 beginning in 1935. No defalcation exceeded $2,000 in any one year. After deducting recoveries effectuated from Welge, the net loss to the Government was $3,865.97. An action to recover this amount was brought on the bond. The defendant as surety admitted its liability to the extent of $2,000, the amount of the bond, and tendered payment of that amount.

Question Passed on by Lower Courts

The question passed on by the District Court and by the Court of Appeals was whether the $2,000 penalty provided for in the bond should be construed as cumulative for each year in which the bond was in force (as contended by the respondent) or as continuous during the employment of the postal employee after the writing of the bond (as contended by the petitioner).

Decision by District Court

The District Court (Smith, D. J.) held that the penalty should be construed as cumulative, resting its decision in part upon the canon of construction that, the petitioner being a compensated surety, any uncertainty in the language of the

bond should be construed against the petitioner as the draftsman (R. 12-21). When the attention of the court upon a rehearing was directed to the fact that the bond in question was on a form prescribed by the United States Post Office Department (R. 26), the court rested its decision on the theory that "it seems more likely that the parties contemplated cumulative coverage" (R. 26; reported at 77 F. Supp. 318).

Decision by Court of Appeals

The Court of Appeals, by a divided vote, affirmed the judgment of the District Court. Judge Clark wrote the opinion of the Court, concurred in by Judge Augustus N. Hand (R. 35-41; reported at 172 F. (2d) 135). Judge Swan wrote a dissenting opinion (R. 41-43; reported at 172 F. (2d) 139).

The majority, in construing the penalty provided for in the bond as cumulative, held that it "does not seem rational to believe that the United States would require a contract from a surety of so little practical value or that a company in business as a paid surety would be justified in contemplating that it had promised so little" (R. 41).

The dissenting opinion noted that the unambiguous terms of the bond, as well as the relevant statutory provisions applicable to bonds given by postal employees, indicated a continuing, not an annually cumulative, liability (R. 41). The dissenting opinion further stressed the option available to a postal employee (39 U. S. C. A. § 814), in lieu of filing a fidelity bond, of depositing Government securities "in a sum equal at their par value to the amount of such penal bond required to be furnished" (6 U. S. C. A. § 15), which obviously did not contemplate that an em-

ployee who exercised this option would be required annually thereafter throughout his term of service to post additional securities of like amount. The dissenting Judge regarded as significant the inconsistency between not requiring an employee who elects to post securities in lieu of a surety bond to duplicate the deposit each year and in imposing cumulative liability on the corporate surety of one who elects to give a bond with such surety instead of posting securities or procuring personal sureties (R. 42).

BASIS OF THIS COURT'S JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 240 (a) of the Judicial Code, as amended by the Act of June 25, 1948 (28 U. S. C. A. § 1254).

The judgment of the Court of Appeals, of which the petitioner herein seeks review, was entered January 25, 1949 (R. 44-45). The within petition for certiorari was filed April 25, 1949.

QUESTION PRESENTED

The sole question passed upon by the lower courts and presented for determination by this Court is:

> On a bond in form prescribed by the Post Office Department which runs for an indefinite term and with respect to which the principal pays annual premiums, is the penalty cumulative or continuing?

[*The District Court held the penalty was cumulative (R. 21), and the Court of Appeals, by a divided vote, affirmed (R. 41).*]

REASON FOR ALLOWANCE OF THE WRIT

The Decision by the Court of Appeals Below (By a Divided Court) Is Believed to Have Decided a Novel Question of Utmost Public Importance Which Has Not Been, But Should Be, Settled by This Court.

This case presents for determination the nature and extent of liability to be imposed upon a surety under a government form of bond, indefinite in term, for a postal employee required to give bond under a specific provision of law. Its implications may be expected to affect the bonds of other government employees and even the fidelity bonds of private individuals. The scope of the question presented is far reaching.

Moreover, no court has ever before held that the payment by a principal of annual premiums on an indefinite term bond converts the bond in effect into a series of separate annual contracts with the result that cumulative liability is imposed on the surety. The decision by the Court of Appeals is novel, as acknowledged by Judge Clark, writing for the Court (R. 36):

> "No cases directly in point have been discovered and we must proceed in the light of the wording of the contract against its background, aided by the incomplete analogy of other cases involving bonds of comparable, but not exactly similar, wording."

And Judge Swan, in his dissenting opinion, stated (R. 43):

> "Concededly there is no decision involving a bond of identical terms."

While the question raised by the instant case does not appear to have been passed upon by any court, prior to the decisions of the courts below, the decisions of those courts are in conflict with the well established principle that in the case of a bond for an indefinite term the payment of annual premiums results in a continuing, not a cumulative, liability and does not give rise to a series of separate yearly contracts. In this respect, the decisions of the courts below are in conflict with the following decisions by several Courts of Appeals:

Montgomery Ward & Co. v. *Fidelity & Deposit Co.*, 162 F. (2d) 264 (C. C. A. 7th, 1947);

Aetna Casualty & Surety Co. v. *First National Bank*, 103 F. (2d) 977 (C. C. A. 3rd, 1939);

Brulatour v. *Aetna Casualty & Surety Co.*, 80 F. (2d) 834 (C. C. A. 2nd, 1936);

Leonard v. *Aetna Casualty & Surety Co.*, 80 F. (2d) 205 (C. C. A. 4th, 1935).

PRAYER

For the reasons outlined above, developed more in detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the United States Court of Appeals for the Second Circuit and that the duly certified transcript of the proceedings below which accompanies this petition shall be treated as though filed in response to the aforesaid writ, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court of Appeals may be reversed; and that

your petitioner may be granted such other, further and different relief as this Court may deem proper.

Dated: Stamford, Connecticut, April 25, 1949.

MARK W. NORMAN
CYRIL COLEMAN
WILLIAM H. TIMBERS
Attorneys for Petitioner
One Atlantic Street
Stamford, Connecticut

CUMMINGS & LOCKWOOD
Stamford, Connecticut,
Of Counsel.

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OCTOBER TERM, 1948

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AMERICAN SURETY COMPANY OF NEW YORK,
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Respondent.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinions of the District Court (R. 12-21, 26) are reported at 77 F. Supp. 318 and 77 F. Supp. 320. The opinion of the Court of Appeals for the Second Circuit (R. 34-576) is reported at 172 F. (2d) 135.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 240 (a) of the Judicial Code, as amended by the Act of June 25, 1948 (28 U. S. C. A. § 1254).

The judgment of the Court of Appeals, of which the petitioner herein seeks review, was entered January 25,

1949 (R. 44-45). The within petition for certiorari was filed April 25, 1949.

STATEMENT OF THE CASE

A summary statement of the matter involved herein is set forth in the petition at pages 2-5, *supra*. Summary of the argument is set forth in the index.

STATUTES INVOLVED

The following statutory provisions, in relevant part, are involved herein.

6 U. S. C. A. § 3:

> "Every officer whose duty it is to take and approve official bonds shall cause all such bonds to be renewed every four years after their dates, but he may require such bonds to be renewed or strengthened oftener if he deem such action necessary. In the discretion of such officer the requirement of a new bond may be waived for the period of service of a bonded officer after the expiration of a four-year term of service pending the appointment and qualification of his successor. The nonperformance of any requirement of the provisions of sections 1 to 3 of this title, or of that part of section 27 of title 19 relating to transmitting copies of oaths to the Secretary of the Treasury, on the part of any official of the Government shall not be held to affect in any respect the liability of principal or sureties on any bond made or to be made to the United States. The liability of the principal and sureties on all official bonds shall continue and cover the period of service ensuing until the appointment and qualifica-

tion of the successor of the principal. Nothing in said sections shall be construed to repeal or modify section 38 of title 39: Provided, That the payment and acceptance of the annual premium on corporate surety bonds furnished by postal officers and employees, officers and employees of other civilian agencies of the United States and bonded officers and enlisted men of the Army, Navy, Marine Corps and Coast Guard shall be a compliance with the requirement for the renewal of such bonds within the meaning of sections 1 to 3 of this title." (July 30, 1947, c. 390, § 1, 61 Stat. 646).

6 U. S. C. A. § 6:

"Whenever any recognizance, stipulation, bond, or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing anything in such recognizance, stipulation, bond, or undertaking specified, is by the laws of the United States required or permitted to be given with one surety or with two or more sureties, the execution of the same or the guaranteeing of the performance of the condition thereof shall be sufficient when executed or guaranteed solely by a corporation incorporated under the laws of the United States or of any State having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings. Such recognizance, stipulation, bond, or undertaking shall be approved by the head of department, court, judge, officer, board, or body executive, legislative, or judicial required to approve or accept the same. No officer or person having the approval of any bond shall exact that it shall be furnished by a guaranty company or by any par-

ticular guaranty company." (July 30, 1947, c. 390, § 1, 61 Stat. 646).

6 U. S. C. A. § 15:

"Wherever by the laws of the United States or regulations made pursuant thereto, any person is required to furnish any recognizance, stipulation, bond, guaranty, or undertaking, hereinafter called 'penal bond', with surety or sureties, such person may, in lieu of such surety or sureties, deposit as security with the official having authority to approve such penal bond, United States Liberty bonds or other bonds or notes of the United States in a sum equal at their par value to the amount of such penal bond required to be furnished, together with an agreement authorizing such official to collect or sell such bonds or notes so deposited in case of any default in the performance of any of the conditions or stipulations of such penal bond. The acceptance of such United States bonds or notes in lieu of surety or sureties required by law shall have the same force and effect as individual or corporate sureties, or certified checks, bank drafts, post-office money orders, or cash, for the penalty or amount of such penal bond. The bonds or notes deposited hereunder, and such other United States bonds or notes as may be substituted therefor from time to time as such security, may be deposited with the Treasurer of the United States, a Federal Reserve bank, or other depositary duly designated for that purpose by the Secretary, which shall issue receipt therefor, describing such bonds or notes so deposited. As soon as security for the performance of such penal bond is no longer necessary, such bonds or notes so deposited shall be returned to the depositor. * * * All laws inconsistent with this section are hereby so modified as to conform to the provisions hereof.

Nothing contained herein shall affect the authority of courts over the security, where such bonds are taken as security in judicial proceedings, or the authority of any administrative officer of the United States to receive United States bonds for security in cases authorized by existing laws. The Secretary may prescribe rules and regulations necessary and proper for carrying this section into effect. The term 'person' in this section means an individual, a trust or estate, a partnership, or a corporation; the term 'Secretary' means the Secretary of the Treasury. In order to avoid the frequent substitution of securities such rules and regulations may limit the effect of this section, in appropriate classes of cases, to bonds and notes of the United States maturing more than a year after the date of deposit of such bonds as security. The phrase 'bonds or notes of the United States' shall be deemed, for the purposes of this section, to mean any public-debt obligations of the United States and any bonds, notes or other obligations which are unconditionally guaranteed as to both interest and principal by the United States." (July 30, 1947, c. 390, § 1, 61 Stat. 646).

39 U. S. C. A. § 132:

"Assistant postmasters and cashiers at first, second, and third class post offices, and when deemed necessary by the Postmaster General for the better protection of the interests of the Government any other employees in such offices, shall, before entering upon the duties of their office, give bond to the United States with good and approved security, and in such penalty as the Postmaster General shall prescribe, conditioned for the faithful discharge of all duties and trusts imposed upon them either by law or the rules and regulations of the Post Office Department." (June 13, 1898, c. 446, § 3, 30 Stat. 444.)

39 U. S. C. A. § 814:

"The Postmaster General may, under such rules and regulations as he shall prescribe, accept United States Liberty loan bonds in lieu of either corporate or personal surety from contractors, officers, and employees of the Postal Service to indemnify the Government against losses resulting from the failure of any contractor, officer, or employee of the Postal Service to properly discharge his official duty." (July 2, 1918, c. 117, § 6, 40 Stat. 753.)

39 U. S. C. A. § 815:

"Whenever any postmaster, clerk, carrier, or other person in the Postal Service, employed in the Post Office Department or elsewhere, notifies the Postmaster General of his desire to execute a new bond, or whenever any of the sureties of such postmaster, clerk, carrier, or other person, notifies the Postmaster General of his desire to be released from such suretyship, or whenever the Postmaster General deems a new bond necessary or expedient, the execution of the new bond may be directed by the Postmaster General. When accepted by the Postmaster General the sureties of postmasters in the prior bond shall be released from responsibility for all acts or defaults of the postmaster which may be done or committed subsequent to the last day of the quarter in which such new bond shall be executed and accepted, and the sureties of other persons in the prior bond shall be released from responsibility for all acts or defaults of such persons which may be done or committed subsequent to the day such new bond becomes operative." (Mar. 3, 1905, c. 1488, 33 Stat. 1259.)

SPECIFICATION OF ERROR TO BE URGED

The Court of Appeals erred in holding the penalty cumulative rather than continuing on a bond in form prescribed by the Post Office Department running for an indefinite term and with respect to which the principal pays annual premiums.

ARGUMENT

POINT I

The express terms of the bond indicate a continuing, not an annually cumulative, liability.

Since the bond in suit is on a printed form prepared by the Post Office Department (R. 10), any ambiguities in the instrument should be construed against the Government according to a well-recognized canon of construction (Williston on Contracts, Rev. Ed., § 621), particularly when the contract form is furnished by a Governmental agency (*Erskine* v. *United States,* 84 F. (2d) 690 (C. C. A. 9th, 1936); *Frye* v. *State of New York,* 78 N. Y. Supp. (2d) 342 (Court of Claims, 1948)).

The bond in question in the instant case, however, presents no ambiguity. Its express terms indicate a continuing, not an annually cumulative, liability. It appears on the face of the bond that there is no fixed term for the bond. The condition of the bond is simply that "if the said employee shall, on and after October 26, 1935, faithfully discharge all the duties and trusts imposed on him." The term of the bond therefore is clearly intended to be the period of the principal's employment on and after October 26, 1935. If

there had been any intention whatsoever on the part of the Government to enter into a series of contracts each of which would impose liability in the amount of $2,000 per year, it would have been a very simple matter for the Government, in preparing and printing its own form of bond, to have expressly limited its term to one year. It failed to do so and instead employed the plainest possible language of continuing liability with the penalty stated to be $2,000, whether the term of the principal's employment turned out to be one year or ten years.

The terms of the bond being free from ambiguity, the corporate surety stands on the same footing as a personal surety executing the same form. The only reference in the bond to the matter of premium is the "certificate" required under Postal Laws and Regulations § 71(5).

The fact that the petitioner in the ordinary course of its business under its collateral agreement with its principal collected each year from its principal a premium of $1.30 is of no relevance. The respondent had no concern with such collateral agreement between the petitioner and the principal, since it is well settled that after the execution and delivery of the bond, it was in full force and effect even if no premium was ever paid. Obviously the petitioner was not entitled to deny its obligation under the bond because of non-payment of the premium by the principal. The respondent not only was under no liability for the payment of the premium but by law was forbidden to pay the premium (6 U. S. C. A. §14).

The fact that the principal by collateral agreement with the respondent paid the premium in annual installments can have no more legal significance, so far as the

construction of the bond is concerned, than if the principal had paid the premium in monthly or semi-monthly installments. In the latter situation, it could hardly be contended that the premium payments converted a bond of continuing liability into a series of separate contracts each for $2,000 of liability or a total accumulation over a period of a year of $24,000 or $48,000 of liability. Such a grotesque result, clearly not contemplated by the express terms of the bond, would differ only in degree from the result reached by the courts below, namely, that the petitioner, having executed the bond under the law of August 13, 1894 (6 U. S. C. A. § 6) which placed corporate sureties on an equal footing with personal sureties, is faced with a total cumulative liability of $20,000 simply because it collected its premium from the principal over a period of ten years at a rate fixed by statute (6 U. S. C. A. § 14).

Wherever possible, a writing is judicially resolved according to its terms, and the court will not look beyond unless compelled to do so by reason of ambiguity or failure to express the common intent of all the parties. While ambiguity may open a door to other relevant writings and to parole, failure to express mutual intent may be cured only by reformation of the writing. Reformation has not here been sought, and the principle need not be dealt with further than to say that if the government did intend that the penalty should be cumulative, the surety did not so intend, and the intent of one party not corresponding with that of the other is not persuasive. Far from the taint of ambiguity, the bond is explicit in every constituent detail. It runs for the term of the employees' employment, and the corporate surety obligates itself during that term for $2,000 with respect to official misdeeds of the employee.

POINT II

The applicable statutory provisions and regulations promulgated thereunder likewise indicate a continuing, rather than a cumulative, liability.

The bond in question was authorized by a federal statute permitting the Postmaster General to require that certain postal employees "when deemed necessary by the Postmaster General for the better protection of the interests of the Government * * * before entering upon the duties of their office * * * give bond to the United States with good and approved security, and in such penalty as the Postmaster General shall prescribe, conditioned for the faithful discharge of all duties and trusts imposed upon them either by law or the rules and regulations of the Post Office Department" (39 U. S. C. A. § 132).

The Post Office at Essex, Connecticut, where Welge was employed in 1935 at the time of the execution of the instant bond was a second class post office. Postal Laws and Regulations § 473 provides that bonds of all employees of first and second class post offices shall be "in accordance with the forms prescribed by the Department".

The Government has not only the power to determine when bonds are to be required of postal employees "for the better protection of the interests of the Government" and to prescribe the forms upon which such bonds shall be written, but it also has the power from time to time to order an increase in the amount of such bonds to provide greater security for the Government; also, to lessen the danger of suretyship deteriorating in value, "Every officer whose duty it is to take and approve official bonds shall

cause all such bonds to be renewed every four years after their dates, but he may require such bonds to be renewed or strengthened oftener if he deem such action necessary" (6 U. S. C. A. § 3).

Likewise, new bonds for postal employees may be substituted for old bonds whenever desired by "any postmaster, clerk, carrier or other person in the Postal Service or when the sureties on postal bonds desire to be released from their suretyship or whenever the Postmaster General deems a new bond necessary or expedient" (39 U. S. C. A. § 815).

These provisions are wholly inconsistent with the notion that the bonds are for terms of one year each. They clearly indicate that the bonds are intended for a period of indefinite duration, terminable only under circumstances prescribed in the foregoing statutory provisions. We submit that there cannot be the slightest doubt as to the Congressional intent that the liability to be created by such bonds was meant to be a continuing, not a cumulative, one. It would be difficult to find a plainer legislative mandate than the following language squarely in point (6 U. S. C. A. § 3):

> "The liability of the principal and sureties on all official bonds shall continue and cover the period of service ensuing until the appointment and qualification of the successor of the principal."

Further confirmation of the concept of continuing liability in bonds of this type is found in 26 Op. Atty. Gen. 70:

> "Bonds given to the United States for the faithful discharge of their duties by officers thereof which are not in terms limited to a specific period expressed

> in dates remain in full force and effect so long as such officer continues in office even though another and different bond by way of renewal may be given."

The legislative development of the statute cited above (6 U. S. C. A. § 3) providing for continuing liability upon official bonds is significant in its bearing upon the question under consideration. This statute in its original form required that such bonds be renewed at least every four years. In order to eliminate the uneconomical and unnecesary renewal procedure required by this statute for bonds written by Treasury-supervised surety companies, the statute was amended in 1928, at the instance of the Post Office Department, to provide that "the payment and acceptance of the annual premium on corporate surety bonds furnished by postal officers and employees * * * shall be a compliance with the requirement for the renewal of such bonds" within the statutory meaning (45 Stat. 247). Congress certainly considered the postal employee bonds to be bonds of continuing, rather than cumulative, liability in providing that the acceptance of the annual premium might be substituted for the earlier statutory requirement of quadrennial renewal.

The following comment upon the proposed amendment is found in H. R. Rep. No. 383, Committee on the Post Office, January 24, 1928:

> "Section 5 of the act of March 2, 1895, requires the renewal of bonds every four years and an examination of bonds every two years with respect to their sufficiency. Compliance with the existing statute results in no benefit to the Government, but causes a loss of time. Post Office officials and employees very generally furnish bonds written by corporate surety companies, and these companies are under the super-

vision of the Treasury Department. So long as the Treasury Department approves a bonding company as acceptable to the Government there is no benefit derived from requiring an employee who furnishes a corporate surety bond to renew that bond at stated intervals. The department may require an official or an employee at any time to furnish a new bond if the existing bond is not sufficient.

"Renewing bonds every four years means extra expense to the employees and more work for the department in recording and filing the bonds. The proposed amendment, which is made in the interest of economy, reads as follows:

"Provided, that the payment and acceptance of the annual premium on corporate surety bonds furnished by postal officers and employees shall be a compliance with the requirement for the renewal of such bonds within the meaning of this act.

"The enactment of this proposed amendment into law is urged by the Postmaster General."

Likewise the proposed amendment was commented upon in the Senate, Cong. Rec., March 2, 1928, p. 3936 (Senator Phipps reporting for the Committee on Post Offices and Post Roads):

"The department advises as follows:

"Renewing bonds every four years means extra expense to the employees and more work for the department in recording the filing of the bonds. The proposed amendment, which is made in the interest of economy, reads as follows:

" 'Provided, That the payment and acceptance of the annual premium on corporate surety bonds furnished by postal officers and employees shall be a

compliance with the requirement for the renewal of such bonds within the meaning of this act.'

"This is a matter, Mr. President, which might really have been passed upon by the department itself, but they did not feel that they had the authority. It does not make any change in the status of the bond whatever, but at the expiration of the four years the Government employee in the Postal Service having paid his annual premium, the bond continues on, the surety having already been approved by the postal authorities."

Probably the most conclusive indication that Congress intended that the postal employee bond in question should be one creating continuing liability, and not cumulative liability, is found in the option (39 U. S. C. A. § 814) given to a postal employee, in lieu of posting a fidelity bond, to deposit Government securities "in a sum equal at their par value to the amount of such penal bond to be furnished" (6 U. S. C. A. § 15). The Postmaster General has promulgated Postal Laws and Regulations § 70 to implement the statutory authority given him in this respect. Obviously such statutory provisions and administrative regulations permitting the deposit of $2,000 of Government securities in lieu of a surety bond in the same amount do not contemplate that a postal employee who exercises such option must annually thereafter throughout his term of service post additional securities in the same amount. Thus it is utterly impossible to reconcile the one statutory provision, which in no conceivable way can be construed to impose cumulative liability with respect to an employee who elects to post securities in lieu of a surety bond, with the companion, alternative statutory provision which the Court below construed to impose cumulative liability with respect to an employee who elects to give a bond instead of posting securities.

The Government now seeks to write into the bond in question multiplication not even suggested by its terms, particularly through the forced construction of the various statutory provisions which deal with the three classes of protection which an employee is authorized to give the government:

(1) Deposit of approved securities of fixed value;

(2) A bond with individual justified sureties;

(3) A bond with corporate surety.

As to (1), the amount remains fixed during the term of employment. As to (2), the individual sureties are required to justify every four years. As to (3), the payment of a yearly premium is evidence of a renewal of the bond.

The employee is not required to supplement a security deposit; so there, no matter what the duration of the employment, the Government's coverage remains constant. Individual sureties, without distinction as to gratuitous or paid, every four years give evidence that they are still able to respond to the extent of their original obligation. Premium payments to corporate sureties evidence the continuance of the Government's coverage.

Indicative of continuing, rather than cumulative, liability is Instruction 9 printed on the back of the bond (Exhibit A; R. 10):

> "Instructions.
>
> 1. It is not required that both corporate and individual surety be furnished, and either kind will be accepted.
>
> * * * * *
>
> 9. The individual sureties must justify, in sums, in unincumbered real estate, equal in the aggregate

to double the penalty of the bond, before a notary public, justice of the peace, or other officer authorized to administer oaths, except a postmaster."

The Government's present contention in logical application would produce incongruous and inequitable situations with constant or variable coverage according to the employee's choice of security: in instances of security deposit, there would never be any increase in coverage, a constant; in instances of individual sureties, there would either be no increase in coverage or a doubling every four years, either a constant or a fluid variable; in instances of corporate sureties, the original coverage would be duplicated annually, a variable.

The rational appraisement of these statutory provisions is that they are intended to assure evidence periodically, where necessary, of continued coverage, and that they are not concerned with the amount of the coverage.

POINT III

The weight of decisional law overwhelmingly supports a construction of continuing, rather than cumulative, liability.

Both Judge Clark, writing for the majority (R. 36), and Judge Swan, in his dissenting opinion (R. 43), conceded that there is no decision directly in point involving a bond in terms identical to those of the bond in the instant case. There is very substantial authority, however, in support of the proposition that where a fidelity bond is for an indefinite term and the only date given is the date the bond becomes effective, the liability created by such a bond is a continuing liability and the fact that premiums are paid annually does not give rise to a series of separate yearly contracts.

In the case of *Brulatour* v. *Aetna Casualty & Surety Co.*, 80 Fed. (2d) 834 (C. C. A. 2nd, 1936), the bond before the court was a fidelity bond, upon which the annual premiums were paid by the employer. The bond was for an indefinite term but might be terminated upon notice by either party. Yearly schedules furnished by the employer set forth the number of positions covered and the amount of coverage required. The schedules recited the "renewal" premiums as consideration for the bonds. In holding that the bond created a continuing liability and did not give rise to a series of separate yearly contracts, the court stated (p. 835):

> "The bond and its yearly schedules did not constitute separate contracts. There is nothing either in the contract or the evidence to indicate that the original contract set up by the bond ever ended. None of the specified means of termination were employed, and there is no showing that it would expire automatically. The bond recited a consideration of an annual premium. This was paid yearly for a continuation of the insurance, as the premiums of a life insurance policy are paid to continue a single contract. The yearly schedules all expressly state that the coverage is under the original bond. The fact that the schedules recited a date upon which they should become effective is not an indication that this original obligation terminated and was renewed each year."

Then the court summarized the rule supported by the weight of the authorities as follows (p. 836):

> "The authorities support the appellant's claims. . . . (they) illustrate the rule that, where the bond is for an indefinite term, the date it begins to run

being the only date given, the fact that the premiums were paid annually does not make the relation a series of separate yearly contracts."

In *Montgomery Ward & Co.* v. *Fidelity & Deposit Co.*, 162 F. (2d) 264 (C. C. A. 7th, 1947), the court stated (p. 266):

> "It is undisputed that the most pertinent factors to be considered in the determination of whether the liability of a suretyship bond is cumulative or continuous are the terms of the bond itself and the acts of the parties in contemplation of the terms of the bond."

In that case a fidelity bond was issued conditioned upon the faithful performance of a public official. The court held that the bond had no expiration date despite the fact that on its back appeared the words "Dated September 1, 1935, Expired September 1, 1936". Since this notation was not signed, the court held it should be disregarded. In construing the bond as one creating continuing liability, the court stated (p. 266):

> "As we have already observed, the bond is for an indefinite term. Dated September 1, 1935, it is void only upon O'Connell's accounting to and turning over 'to his successor in office, or to such other persons as may be designated by his superior officer, all records, property, money, books and papers, and all other property appertaining to his office * * * that shall come into his hands by virtue of said office * * *.' From the foregoing, it is clear that the bond was to remain in force as long as O'Connell remained in office, whether that be for six months or six years. Apparently there was no contractual method for termination by affirmative action of the parties, as none appears on the face of the bond."

In the case of *Aetna Casualty & Surety Co.* v. *First National Bank,* 103 F. (2d) 977 (C. C. A. 3rd, 1939), the court held that a fidelity bond, issued to cover losses occasioned by the dishonesty of a bank cashier and terminable only by notice or the retirement of such cashier, created a continuing liability despite the payment of premiums on an annual basis (pp. 978-979):

> "Upon its face the bond represents a continuous and continuing liability upon the part of the appellant which could be terminated only as provided by the fourth clause of the bond. The schedule shows the amount of insurance carried in respect to Trezise as $15,000. This represents the maximum amount of the appellant's liability in respect to the employee named. There is not a word or a phrase in the bond which indicates the creation of successive periods of liability on the part of the appellant."

In *Leonard* v. *Aetna Casualty & Surety Co.,* 80 F. (2d) 205 (C. C. A. 4th, 1935), a bank paid the annual premiums on a fidelity bond covering its employees. The bond was terminable only by written notice of the bank or by retirement of the employee covered. In holding that the bond was a continuous contract covering the entire period of employment and was not to be construed as giving rise to a series of independent, annual contracts, the court stated (p. 206):

> "The question at issue is to be decided by determining whether the parties contemplated a single continuous contract covering the entire period, or a series of independent contracts, each for the period of one year; and the solution necessarily depends upon the terms of the bond. It will be noticed in the first place that the instrument did

> not specify a definitely limited period terminating on a certain date, with the privilege of renewal, but covered the period commencing on August 17, 1925, and continuing until the suretyship was terminated by affirmative action, that is, by notice of termination by one of the parties to the contract, by retirement of the employee from the service, or by the discovery of loss. Secondly, no additional agreement was needed to extend the period of the coverage of the bond. It is true that an annual premium was to be paid by the bank, but this provision did not limit the period of the contract; it merely described the consideration running to the surety. There was no requirement for the renewal of the bond upon payment of the annual amount, and no stipulation that liability should cease if the annual premium should not be paid. Finally, the limitation upon the liability of the surety as to each year of the period did not become effective with regard to the expiration of the year, but only with regard to the expiration of one continuous term; for the fourth paragraph of the bond, quoted above, provided that the surety should be liable for losses discovered during the term of the bond 'or within two years after termination thereof'."

The court went on to summarize the consensus of the authorities on this point as follows:

> "They point out that such bond as that now under discussion is not made for one year with the privilege of renewal annually, but one entire bond for an indefinite period, or for such period as it should be continued by payment of an annual premium like an ordinary life insurance policy; that no additional action of the parties is necessary to keep the contract in force, and it is not necessary to make

a new contract each year; and, moreover, that bonds of this sort extend the time for discovery of loss and remove the difficulty experienced by the obligee in many cases of proving when a defalcation occurred and against what period of contract it should be charged. It may be that the last-mentioned benefit is not so valuable to the assured as the right to collect the amount of the bond for each of the years in which a defalcation occurs, as is strongly urged in Aetna Cas. & Surety Co. v. Commercial State Bank (D. C.) 13 F. (2d) 474 (reversed on other grounds in (C. C. A.) 19 F. (2d) 969); but it is for the parties and not for the court to agree upon the obligations by which they are to be bound."

The following authorities are to the same effect as those discussed above:

Hartford Accident and Indemnity Co. v. *Hood,* 226 N. C. 706, 40 S. E. (2d) 198 (1946);

Quinlan & Tyson v. *National Casualty Co.,* 311 Ill. App. 369, 36 N. E. (2d) 470 (1941);

National Bank of North Hudson at Union City v. *Nat'l Surety Co.,* 144 Atl. 576, 105 N. J. L. 330 (1929);

Fourth & First Bank & Trust Co. v. *Fidelity & Deposit Company of Maryland,* 153 Tenn. 176, 281 S. W. 785 (1926);

State ex rel. Freeling, Atty. Gen. v. *New Amsterdam Casualty Co.,* 236 P. 603 (Okl.) (1925).

See also: 42 ALR 834.

CONCLUSION

For the reasons stated in the petition and in this brief, and particularly since the question here presented is a novel one of utmost public importance, we urge that a writ of certiorari be issued by this Court in order that the question presented in the foregoing petition may be reviewed by this Court.

Dated: Stamford, Connecticut, April 25, 1949.

Respectfully submitted,

MARK W. NORMAN
CYRIL COLEMAN
WILLIAM H. TIMBERS
Attorneys for Petitioner
One Atlantic Street
Stamford, Connecticut

CUMMINGS & LOCKWOOD
Stamford, Connecticut
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 750

AMERICAN SURETY COMPANY OF NEW YORK,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the United States District Court for the District of Connecticut (R. 12-21, 26) are reported at 77 F. Supp. 318. The opinion of the Court of Appeals for the Second Circuit (R. 34-43) is reported at 172 F. 2d 135.

JURISDICTION

The judgment of the Court of Appeals was entered January 25, 1949 (R. 44-45). The petition for a writ of certiorari was filed on April 25, 1949. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Where a postal employee's surety bond provides a penal sum of $2000, a "total premium" of $1.30, an indefinite term, and does not limit aggregate liability, and the employee continues to pay annual premiums of like amount, may the United States, as obligee of the bond, recover cumulative penalties of $2000 for each year the bond is in force, or is the surety's liability limited to $2000 for all breaches occurring during the entire time the bond was effective even though that sum was exhausted by early defalcations not discovered for many years.

STATUTES INVOLVED

The pertinent provisions of the applicable statutes are set out in the Appendix, *infra,* pp. 13-17.

STATEMENT

This action was brought by the United States, as obligee, to recover from a surety company upon a bond securing the faithful performance of his duties by one Welge, a postal employee. The case was tried on a stipulation of facts (R. 7-9).

On October 26, 1935, Welge, as principal, and petitioner, as surety, executed a bond on Government Form 1117 in the penal sum of $2,000. Its condition was "that if the said employee shall, on and after October 26, 1935, faithfully discharge all the duties and trusts imposed on him as such

heretofore designated employee * * * then this obligation shall be void; otherwise, of force" (R. 10). The bond also stated that "the premium of this bond is $0.65 per $1,000" and the "total premium charged $1.30" (R. 10).[1] Annually thereafter until 1944, Welge paid a like amount for the renewal of the bond. It was then discovered that, beginning in 1935, he had been guilty of a series of embezzlements amounting to $7,949.72. In any one year, however, the defalcations never exceeded $2,000. Restitution being made by Welge in the sum of $4,083.75, the United States made demand of petitioner in the remaining amount of $3,865.97. Petitioner tendered $2,000, the penal sum of the original bond, which was refused (R. 8-9); this suit followed. The District Court for the District of Connecticut concluded that "on the payment of each additional premium, the parties entered into a contract similar to terms to the original bond, guaranteeing the United States in the amount of $2,000 against embezzlement by the employee from the date of payment of the additional premium," that "liability on the bond is cumulative on the original and each renewal," and that "plaintiff is entitled to recover on the bond the amount of $3,865.97, and interest, together with its costs" (R. 21). The Court of Appeals, one judge dissent-

[1] It also contained the statement that "the amount of premium charged for a like bond during the year 1908 was $2.00 per $1,000." This information was given because of a statutory prohibition of a charge more than 35 per cent in excess of the 1908 rate. 6 U.S.C. 14.

ing, affirmed the judgment of the District Court, rejecting petitioner's contentions that liability was continuous rather than cumulative, and was limited to a maximum of $2,000. "It does not seem rational to believe that the United States would require a contract from a surety of so little practical value or that a company in business as a paid surety would be justified in contemplating that it had promised so little" (R. 41).

ARGUMENT

Petitioner has executed, and the United States has accepted, a surety bond for the faithful discharge of a postal clerk's duties which contains no explicit language defining the aggregate liability of petitioner, as surety. The question presented for decision is whether the parties intended to provide for successive annual liabilities of $2,000 or for a continuous liability limited to $2,000. That question—basically a matter of specific contractual intent—is one of limited applicability which may never be raised again in this form, and in any case will probably arise only infrequently in the future. As to future fidelity bonds, the intention of the parties on this point can, and presumably will, be made clearer.[2] And as to fidelity bonds al-

[2] The attention of the Court is called to the possibility that the existing system of fidelity bonds may be entirely supplanted by a Governmental fidelity trust fund. H.R. 4002, 81st Cong., 1st sess., provides for the establishment and maintenance of a fidelity trust fund in the Post Office Department, in lieu of requiring employees to furnish fidelity bonds. S. 1692 and H.R. 4642, 81st Cong., 1st sess., would amend

ready executed, it seems unlikely that any substantial number of controversies will actually result from this particular problem (see *infra*, pp. 8-9); moreover, the barrenness of the record made below, which contains little evidence of intent other than the bond itself, makes it questionable that a finding by this Court on the question of the parties' intent would necessarily be applicable in future litigation where a fuller record is made.[3] In view of these considerations, and of the correctness of the Court of Appeals' decision on the present record, we submit that further review is not warranted.

1. Nothing on the face of the bond supports petitioner's contention that the successive annual premiums were merely installment payments on an entire insurance contract, restricted to a recovery of no more than $2,000 over an indefinite period. Reliance is placed on the wording of the condition "if the said employee shall, on and after October

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Sections 1-5, inclusive, of title 6 of the United States Code, and establish a Federal fidelity trust fund covering all employees of the Government. See also The Commission on Organization of the Executive Branch of the Government, *Report on the Treasury Department, March 1949*, Recommendation No. 10, p. 21.

[3] Cf. *American Stevedores* v. *Porello*, 330 U.S. 446, 457. Neither the postal employee's application for the surety bond nor the annual premium receipts were introduced in evidence. These documents may afford a material insight to the parties' intention, particularly in the case of the receipts which are frequently required, by government administrative practice, to be furnished by the accountable employee to the proper government official for approval, to insure that proper coverage is obtained. See, *e. g.*, Treasury Department Circular No. 745, as issued on July 10, 1944 (see Circular No. 745, as revised March 18, 1946, reprinted in the *amicus curiae* brief, p. 34).

26, 1935, faithfully discharge all the duties and trusts imposed on him," but such language is not inconsistent with an intention to provide for successive annual penalties. The premium charged is the "total" premium "of this bond," thus tending to indicate that the annual renewals constituted separate agreements. This ambiguity is not relieved by other terms of the bond; there is no express provision made for termination of the bond, for renewals, or for annual or other periodic premium payments.

Absent compelling external indicia of intent or more precise language, we believe that the practical considerations found persuasive by the district court (R. 26) and the court below (R. 41) offer a proper guide to a determination of the surety coverage which the Government obtained. Under petitioner's theory, if there were a loss of $2,000 the first year, not discovered for several years, then, though equal annual premiums are successively paid, the United States would have no protection for those later years because the penalty of the bond was completely exhausted by the first year's losses and nothing remained to cover subsequent losses. As the court said in *Aetna Casualty & Surety Co.* v. *Commercial State Bank of Rantoul,* 13 F. 2d 474, 476 (E.D. Ill.), reversed on other grounds, 19 F. 2d 969 (C.A. 7)—a comparable case of successive annual payments—"what did he [the obligee] buy the second year?" "We are the more persuaded to this view by the improbability that a practical bus-

iness concern * * * would pay one company two premiums for a single right of recovery if it could by payment of the same sum to two separate insurance carriers procure recoverable insurance for two periods." *Standard Accident Ins. Co.* v. *Collingdale State Bank,* 85 F. 2d 375, 376 (C.A. 3).[4] Since the renewal premiums were equal in amount to the initial premium, the most reasonable interpretation is that they should provide equal coverage without diminishing the coverage for undiscovered defalcations in the previous period.[5]

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[4] While the United States did not pay the premiums in the instant case, it was of course the obligee of the bonds and conformably with statutes was in a position to direct the principal, its employee, to place the bond in any manner it saw fit. Accordingly, the contention of petitioner (Pet. p. 16) that the payment of premiums was a matter of concern only to the principal and surety and was of no moment to the obligee is neither persuasive nor accurate.

[5] By statute, the liability of a surety on an official bond continues and covers "the period of service ensuing until the appointment and qualification of the successor of the principal." 6 U.S.C. 3 (*infra*, pp. 13-14); 26 Op. A.G. 70. A new bond may be substituted under the procedure stated in 39 U.S.C. 815 (*infra*, pp. 16-17), but when the substitution is accomplished, the sureties in the prior bond are released from responsibility only for defaults of the principal committed "subsequent to the day such new bond becomes operative." Thus, liability for a defalcation of the principal occurring in any one year would continue whether or not a renewal premium is paid for a later year. Hence, renewal payments must constitute successive new agreements to the extent of $2,000 each or serve no purpose.

It is suggested as an opposing practical consideration that the continuous form of bond obviates the necessity of proving the particular period in which the defalcations took place. *Leonard* v. *Aetna Casualty & Surety Co.*, 80 F. 2d 205, 207 (C.A. 4). But, as the court below says, "How important a practical consideration this may be is not clear; one suspects it is more bookish than real in cases of substantial and proven embezzlements of postal clerks. But in any event, such a

Cf. *Maryland Casualty Co.* v. *First Nat. Bank of Montgomery, Ala.*, 246 Fed. 892, 900 (C.A. 5), certiorari denied, 246 U. S. 670. Unquestionably, public policy dictates that the Government be protected as fully as possible from the misfeasance of its officials and employees. We submit that an intent to acquire less than complete protection for the Government, by payment of exactly the same sums for which complete protection might easily be had, cannot properly be imputed either to the Post Office Department which prescribed the form, the Government officials who accepted the bond, or the employee for whom petitioner is surety.

Nor is there any merit to the contention suggested by Judge Swan in his dissent below, that "it seems highly improbable that the surety would voluntarily incur a maximum liability of $20,000 for $13 (assuming the employee's term of service should continue for ten years)." (R. 43). That suggestion is completely rebutted by the fact that assessable recoveries from sureties have averaged only about $230,000 annually (the recent war period included) although the aggregate annual premium cost to the Government's accountable officers and employees was about $2,000,000. See The Commission on Organization of the Executive Branch of the Government, *Report on the Treasury Department, March 1949*, p. 21. Because of this very disproportion of costs and recoveries, that Com-

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detail of proof can hardly offset the very real need of a right to collect the amount of the bond for each of the years in which a defalcation occurs." (R. 39).

mission has recommended that the Government establish its own fidelity trust fund. See Note 2, *supra*.[6]

2. Petitioner urges that the legislative development of 6 U.S.C. 3 (*infra*, pp. 13-14) demonstrates that continuing but limited, rather than cumulative, liability was intended. In its original form, the statute required that bonds be renewed every four years.[7] In 1928 it was amended to provide that "the payment and acceptance of the annual premium on corporate surety bonds furnished by postal officers and employees shall be a compliance with the requirement for the renewal of such bonds" within the statutory meaning. 45 Stat. 247. Petitioner asserts that Congress, in making this change, certainly considered the existing bonds to be of continuing liability (Pet. p. 20).

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[6] Petitioner contends that these periodic payments were merely annual installments which had no more legal significance than if the premium had been paid in monthly or semi-monthly installments. (Pet. pp. 16-17). The argument is without merit, and overlooks the fact that the bond does not provide for a premium payable in annual installments but, in express terms, states that the "total premium" charged is $1.30. Petitioner's argument necessarily supposes that the risk of embezzlement is calculated for an indefinite term of employment, then divided to obtain periodic premium installments which are equal for each employee, although terms of employment may be of different duration. On the contrary, we think it most probable that the premium charged was based on a risk calculated for the period of a year.

[7] The renewals were termed "new" bonds. "Every officer whose duty it is to take and approve official bonds shall cause all such bonds to be renewed every four years after their dates, but he may require such bonds to be renewed or strengthened oftener if he deem such action necessary. In the discretion of such officer the requirement of a *new* bond may be waived * * *." [emphasis supplied] 6 U.S.C. 3.

We cannot agree. The prior quadrennial renewals secured cumulative coverage to the Government. See 4 Comp. Dec. 411, 415; 5 Comp. Dec. 918, 922; 26 Op. A.G. 70. The amendment of 1928 was adopted at the instance of the Post Office Department because this procedure was uneconomical and unnecessary for bonds written by Treasury-supervised companies.[8] The court below properly points out that it is too much to say that the provision for annual premiums, adopted simply for administrative convenience, was intended to limit drastically the cumulative coverage which the Government then enjoyed by reason of the previous quadrennial renewals of all bonds (R. 38).

Petitioner notes, however, that Government employees, in lieu of filing a fidelity bond, may deposit Government securities "in a sum equal at their par value to the amount of such penal bond required to be furnished." 6 U.S.C. 15. A cumulating deposit of securities would presumably not be required, petitioner contends, and if the alternative provisions are to be reconciled, the provision for a surety bond cannot be construed to impose cumulative liability. Post Office Department files reveal that no deposits of securities have ever been made, and hence there is no administrative practice which would indicate the proper interpretation of the deposit provision. We think it significant however, as did the court below (R. 38-39), that "the de-

[8] See H. Rep. 383, 70th Cong. 1st sess.; 69 Cong. Rec. 3936.

posit provision exists side by side in the statutes with the original quadrennial renewal provision * * * it seems particularly unlikely that Congress would have meant not to protect the Government by annual premiums paid to the same insurer, when protection could have been obtained merely by application to another surety * * * Whatever may turn out to be the proper interpretation of the deposit provision, we think it cannot be held to limit the force of the requirement for an annual additional premium."

3. As Judge Clark indicates (R. 39-40), the cases involving private litigants and bonds of comparable, but not exactly similar, wording afford only an incomplete analogy.[9] Those bonds which contain language clearly negativing cumulative liability are plainly not in point. Where the language of the bond is more general, the better considered cases find cumulative liability by reason of the practical considerations set out above (*supra*, pp. 6-7), and which we agree with the Court of Appeals are likewise decisive here. See *Maryland Casualty Co.* v. *First Nat. Bank of Montgomery, Ala.*, 246 Fed. 892, 900 (C.A. 5), certiorari denied, 246 U.S. 670; *Aetna Casulty & Surety Co.* v. *Commercial State Bank of Rantoul*, 13 F. 2d 474, 476 (E.D. Ill.), reversed on other grounds, 19 F. 2d 969 (C.A. 7); *Standard Accident Ins. Co.* v. *Collingdale State Bank*, 85 F. 2d 375, 376 (C.A. 3).

[9] No cases in point involving federal surety bonds have been found.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
PAUL A. SWEENEY,
BENJAMIN FORMAN,
HADLEY W. LIBBEY,
Attorneys.

JUNE 1949.

APPENDIX

The following statutory provisions are involved herein:

6 U. S. C. 3:

Every officer whose duty it is to take and approve official bonds shall cause all such bonds to be renewed every four years after their dates, but he may require such bonds to be renewed or strengthened oftener if he deem such action necessary. In the discretion of such officer the requirement of a new bond may be waived for the period of service of a bonded officer after the expiration of a four-year term of service pending the appointment and qualification of his successor. The non-performance of any requirement of the provisions of sections 1 to 3 of this title, or of that part of section 27 of title 19 relating to transmitting copies of oaths to the Secretary of the Treasury, on the part of any official of the Government shall not be held to affect in any respect the liability of principal or sureties on any bond made or to be made to the United States. The liability of the principal and sureties on all official bonds shall continue and cover the period of service ensuing until the appointment and qualification of the successor of the principal. Nothing in said sections shall be construed to repeal or modify section 38 of title 39: *Provided,* That the payment and acceptance of the annual premium on corporate surety bonds furnished by postal officers and employees, officers and employees of other civilian agencies of the United States and bonded

officers and enlisted men of the Army, Navy, Marine Corps, and Coast Guard shall be a compliance with the requirement for the renewal of such bonds within the meaning of sections 1 to 3 of this title. (July 30, 1947, c. 390, § 1, 61 Stat. 646).

6 U. S. C. 15:

Wherever by the laws of the United States or regulations made pursuant thereto, any person is required to furnish any recognizance, stipulation, bond, guaranty, or undertaking, hereinafter called "penal bond", with surety or sureties, such person may, in lieu of such surety or sureties, deposit as security with the official having authority to approve such penal bond, United States Liberty bonds or other bonds or notes of the United States in a sum equal at their par value to the amount of such penal bond required to be furnished, together with an agreement authorizing such official to collect or sell such bonds or notes so deposited in case of any default in the performance of any of the conditions or stipulations of such penal bond. The acceptance of such United States bonds or notes in lieu of surety or sureties required by law shall have the same force and effect as individual or corporate sureties, or certified checks, bank drafts, post-office money orders, or cash, for the penalty or amount of such penal bond. The bonds or notes deposited hereunder, and such other United States bonds or notes as may be substituted therefor from time to time as such security, may be deposited with the Treasurer

of the United States, a Federal Reserve bank, or other depositary duly designated for that purpose by the Secretary, which shall issue receipt therefor, describing such bonds or notes so deposited. As soon as security for the performance of such penal bond is no longer necessary, such bonds or notes so deposited shall be returned to the depositor. In case a person or persons supplying a contractor with labor or material as provided by sections 270a to 270d of title 40 shall file with the obligee, at any time after a default in the performance of any contract subject to said sections 270a to 270d, the application and affidavit therein provided, the obligee shall not deliver to the obligor the deposited bonds or notes nor any surplus proceeds thereof until the expiration of the time limited by said sections 270a to 270d for the institution of suit by such person or persons, and, in case suit shall be instituted within such time, shall hold said bonds or notes or proceeds subject to the order of the court having jurisdiction thereof. Nothing herein contained shall affect or impair the priority of the claim of the United States against the bonds or notes deposited or any right or remedy granted by said sections 270a to 270d or by this section to the United States for default upon any obligation of said penal bond. All laws inconsistent with this section are hereby so modified as to conform to the provisions hereof. Nothing contained herein shall affect the authority of courts over the security, where such bonds are taken as security in judicial proceedings, or the authority of any adminis-

trative officer of the United States to receive United States bonds for security in cases authorized by existing laws. The Secretary may prescribe rules and regulations necessary and proper for carrying this section into effect. The term "person" in this section means an individual, a trust or estate, a partnership, or a corporation; the term "Secretary" means the Secretary of the Treasury. In order to avoid the frequent substitution of securities such rules and regulations may limit the effect of this section, in appropriate classes of cases, to bonds and notes of the United States maturing more than a year after the date of deposit of such bonds as security. The phrase "bonds or notes of the United States" shall be deemed, for the purposes of this section, to mean any public-debt obligations of the United States and any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States. (July 30, 1947, c. 390, § 1, 61 Stat. 646).

39 U. S. C. 815.

Whenever any postmaster, clerk, carrier, or other person in the Postal Service, employed in the Post Office Department or elsewhere, notifies the Postmaster General of his desire to execute a new bond, or whenever any of the sureties of such postmaster, clerk, carrier, or other person, notifies the Postmaster General of his desire to be released from such suretyship, or whenever the Postmaster General deems a new bond necessary or expedient, the execution of the new bond may be directed

by the Postmaster General. When accepted by the Postmaster General the sureties of postmasters in the prior bond shall be released from responsibility for all acts or defaults of the postmaster which may be done or committed subsequent to the last day of the quarter in which such new bond shall be executed and accepted, and the sureties of other persons in the prior bond shall be released from responsibility for all acts or defaults of such persons which may be done or committed subsequent to the day such new bond becomes operative. (Mar. 3, 1905, c. 1488, 33 Stat. 1259).

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CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 750.

AMERICAN SURETY COMPANY OF NEW YORK, *Petitioner,*

v.

UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI ON BEHALF OF THE ASSOCIATION OF CASUALTY AND SURETY COMPANIES, AMICUS CURIAE.

ALEXANDER M. HERON,
Munsey Building,
Washington, D. C.

Attorney for The Association of Casualty and Surety Companies. Amicus Curiae.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Introduction.

This brief is filed on behalf of the Association of Casualty and Surety Companies, a membership association composed of 68 corporations which engage in the casualty and surety business. Under the applicable statutes and regulations, 44 of these member corporations, which are qualified to become sureties on bonds running to the United States, write post office bonds or other federal official bonds. The decision in this case directly affects in excess of three hundred thousand bonds written by these companies and now outstanding.

Opinion Below.

The opinions of the District Court (R. 12, 26) are reported in 77 Fed. Supp. 318, 320 while the opinion of the Court of Appeals (R. 41) is reported in 172 F (2d) 135.

The Question.

The question for decision is whether or not a bond of indefinite duration in the penal sum of $2,000.00 conditioned for the faithful performance of the principal's duties as a postal clerk (1) creates a liability limited to $2,000.00 for breaches occurring during the entire time it was in force, or (2) whether the payment of an annual premium by the principal in said bond to the surety thereon creates a new and independent obligation for breaches to the extent of $2,000.00 for each year it was in force.

Statement of the Case.

William H. Welge, a clerk in the United State Post Office at Essex, Connecticut (a second class post office) gave a bond dated October 26, 1935 to the United States in the penal sum of $2,000.00 (R. 17). Petitioner was the corporate surety thereon. The bond (R. 18, 10) was executed on Post Office Department Form 1117—a prescribed form of the Department. Its condition was that Welge should faithfully discharge all the duties and trusts imposed on him as a clerk in the Post Office at Essex, Connecticut, either by law or by the rules or regulations of the Post Office Department and should faithfully account for, deliver, and pay over to the proper official or person all monies, mail matter, and other property of every kind which should come into his hands by virtue of his occupancy of any position in the Post Office to which he might be appointed. The bond contained no termination date.

The bond stated that the premium rate was $.65 per $1,000.00 and that the premium charge for a like bond during the year 1908 was $2.00 per $1,000.00 (R. 19). The

total premium charged on this basis was $1.30. Annual premium payments were made to the surety by Welge from 1935 to 1944 inclusive (R. 19). During that period Welge failed to account for and pay over to the Post Office Department a total of $7,949.72 (R. 20). In no single year did the amounts for which Welge failed to account exceed $2,000.00.

A total of $4,083.75 was recovered by the United States from Welge and applied against his defalcations for the period from October 26, 1935 to October 26, 1939, thus reducing the balance due from him to $3,865.97 (R. 20). For this amount the United States made claim in an action brought against the surety in the United States District Court for the District of Connecticut. The surety admitted liability for $2,000.00, but denied liability for the remainder of the sum claimed.

Purpose of Brief.

It is the purpose of this brief to draw attention to the importance of obtaining an authoritative decision as to the extent of liability incurred upon bonds given by Postal and other employees and officials of the United States pursuant to the statutes requiring such bonds and regulating the practice in connection therewith. The decision of the court below creates a total penalty of $20,000.00 in the instrument. This result reached by the courts below cannot be sustained on the basis of the amendment in 1928 to the statute governing the administration of bond matters. The conclusion of the courts below has been reached without the slightest suggestion in the statute, or in the legislative history of the change, that such a result was intended. It is a conclusion which has been reached in face of the fact that the other alternate methods of providing security for such bonds have clear limitations which are wholly inconsistent with the result reached by the courts below.

ARGUMENT.

The bond here involved was given under the provisions of the Act of June 13, 1898, 39 U.S.C. 132, 30 Stat. 444 (App. 13) and the Act of March 2, 1895, 6 U.S.C. 3, 28 Stat. 807 as modified by the Act of March 8, 1928, 45 Stat. 247 (now 61 Stat. 646, App. 13). 39 U.S.C. 132 authorized, and § 473 of the Postal Regulations required, the taking of the bond. 6 U.S.C. 3 dealing with continuance of liability on official bonds, requires such bonds to be renewed every four years. The amendment of March 8, 1928 provided that the payment and acceptance of the annual premium on corporate surety bonds furnished by postal offices and employees should "be a compliance with the requirement for the renewal of such bonds" within the meaning of the statute. By a further enactment of March 31, 1944, 58 Stat. 135, the same proviso was extended to officers and employees of other civilian agencies of the United States and bonded officers and enlisted men of the Army, Navy, Marine Corps and Coast Guard, thus making the proviso one of general application and increasing the scope and importance of the decision here.

The basic provisions of both 39 U.S.C. 132 and 6 U.S.C. 3, the prescribed bond form with its detailed instructions, all contemplate that the bonds required shall be surety bonds, but there is no requirement that the sureties be corporate. It is only by virtue of the Act of August 13, 1894, 28 Stat. 279, 6 U.S.C. 6, that corporate sureties are permitted to qualify on these bonds.[1] The effect of the decisions below is to achieve a different coverage from the same bond form, depending upon the election of the employee as to the form of security. If the surety were corporate, the decision creates a new bond for each year whereas if the surety were personal, or if a deposit of

[1] Of particular interest and significance is the final sentence of that section: "No officer or person having the approval of any bond shall exact that it shall be furnished by a guaranty company or by any particular guaranty company".

Government securities were made, the coverage is limited to the penal sum of the bond.

39 U.S.C. 814 authorizes "in lieu of either corporate or personal surety" the deposit of Liberty Bonds. 6 U.S.C. 15 authorizes the deposit of United States bonds or notes in a sum equal at par to the amount of the penal bond required to be furnished. Treasury Circular No. 154 Revised, issued February 6, 1935 (App. 27) amending and supplementing Treasury Circular No. 154 dated April 30, 1926 provides in detail the mechanics for the deposit of such bonds, notes or other obligations of the United States in lieu of sureties. It is to be noted that where securities are deposited a bond on Form F as prescribed in the circular is required, but without sureties, either personal or corporate.

As a consequence of these provisions the employee is given the option of using one of the three methods provided: namely, (1) he may give bond with two personal sureties who shall qualify themselves by establishing ownership in unencumbered real estate, in sums equal in the aggregate to double the penalty of the bond (see Instruction 9, Bond Form R. 10); (2) he may give bond with notes or other Government obligations as collateral security as specified in Treasury Department Circular 154 Revised; or (3) he may give a bond with approved corporate surety. In the first instance the sureties are considered adequate if their property holdings in the aggregate are double the penalty of the bond while in the second instance the bond is acceptable if the securities deposited with it are equal in value at par to the penal sum named in the bond. In the third case it is sufficient that the surety be upon the approved list of the Treasury Department.

Prior to the amendment of 6 U.S.C. 3 in 1928, all official bonds were mandatorily required to be renewed quadrennially. The Comptroller-General in response to an inquiry from the Postmaster General as to whether the annual payment of premiums on corporate surety bonds could be con-

sidered as a compliance with the quadrennial renewal requirement, advised that:

> "There appears nothing in the provision of the Act of March 2, 1895, here in question, to warrant a conclusion that the annual payment of premiums on such bonds constitutes a renewal thereof as required by statute. What is contemplated under the requirement is such a fixing of liability with respect to time that the accounts may be finally closed and the liabilities definitely determined under the old bond and new accounts opened up under the new bond. While said provision is addressed to the administrative officers whose duty it is to take and approve official bonds, and impose on them the responsibility of causing all such bonds to be renewed every four years, good accounting procedure requires that the failure to renew be called to the attention of the administrative office concerned when this office is called upon to approve a requisition for funds under a bond dated more than four years prior to such requisition, and to take such further steps as may be deemed necessary to protect the fiscal interests of the United States in any particular case." 7 Comp. Gen. 43, July 16, 1927.

In light of this ruling it was obvious that the Post Office Department could not depart from a compliance with the quadrennial renewal provision of the statute. Accordingly, the amendment of March 8, 1928 followed at the request of the Post Office Department.

The report of the House of Representatives, Committee on the Post Office, January 24, 1928, Report No. 383, recited the administrative inconvenience connected with the quadrennial renewal of bonds, pointing out that so long as the Treasury approved the bonding company as acceptable, no benefit was derived from requiring a new bond, but that the Post Office could require a new bond if the then existing bond were not sufficient. The report of the Senate Committee on Post Office and Post Roads, Congressional Record March 2, 1928, page 3936 advised that the proposed amendment did not make any change in the status of the bond

whatever, but that it would continue on beyond the four years where the employee paid his annual premium.

In 1944 the Navy Department requested an amendment which would excuse its personnel from the quadrennial renewal of bonds by placing them in the same category with postal employees. While the bill was under consideration similar requests came forward both from the War Department and the Treasury, which was of the belief that the legislation should apply uniformly to the entire federal service. In the hearings upon that bill before the Committee on Naval Affairs of the House of Representatives [2] the representative on behalf of the Navy Department testified:

> Commander Brown. "* * * The practical effect would be that when the officer goes to accountable duty and takes out a bond, he is required by law in the Navy to be bonded as long as he is on that accountable duty, whether it is two years or six years, and the original bond that he takes out when he goes on duty continues as long as he is on that duty, and he is required to make payment of the premium."
>
> * * * * * * * * * *
>
> The Chairman. "Now you propose to continue him under the bond by merely a continued payment of the premium.
>
> Commander Brown. "A continued payment of the premium which would continue the old bond instead of the renewal.
>
> * * * * * * * * * *
>
> The Chairman. "Then the renewal of the premium does not cost as much as writing a new bond?
>
> Commander Brown. "There is no difference in the cost to the individual officers.
>
> The Chairman. "Is it the same?
>
> Commander Brown. "It is the same. Of course, there is the paper work involved."

---

[2] Hearing on S. 1647, No. 200, February 25, 1944.

There was also submitted to the committee a letter from Secretary of the Navy Knox in which he said:

> "The amendment to the act of March 2, 1895, by the act of March 8, 1928 (45 Stat. 247), was enacted apparently at the behest of the Post Office Department following the receipt by that Department of an opinion of the Comptroller General (7 Comp. Gen. 43) to the effect that annual payment of premiums on corporate surety bonds could not be construed as compliance with the provisions of the act of March 2, 1895, requiring renewal of such bonds every 4 years.
>
> "In urging a relaxation of the requirement for renewal of bonds, the Postmaster General in a letter to the Comptroller General dated June 16, 1927, invited attention to the large amount of effort and expense incident thereto and the fact that little or nothing was accomplished in protecting the Government's financial interest by having a new document executed every 4 years. These arguments would apply with equal or greater force to the situation now prevailing in the Navy.
>
> "The proposed legislation, if enacted into law, would involve no additional expense to the Government."

The Committee then reviewed the current practice of auditing both by the departments involved and the General Accounting Office of the accounts of financial and other fiscal officers. The bill was favorably reported and passed. The Hearing on this bill also contains some very enlightening material on the background and purpose of the 1928 amendment and confirms what has heretofore been stated with regard thereto. See Report (App. 14).

With the amendment of 1944 the Treasury issued on July 10, 1944, Department Circular No. 745 instructing the heads of executive departments, establishments and agencies as to the procedure to be followed in the obtaining of original premium receipts evidencing the payment of premiums pursuant to the amendment. On March 18, 1946, this circular was revised (Department Circular No. 745, Revised, App. 34) by the issuance of another which reverted to the

practice prior to the amendment, i. e., of requiring the execution of a new bond at the end of each four year period.[3] This action by the Treasury in effect nullified the application of the amendment with respect to all officers and employees whose bonds were to be received and approved by the Secretary of the Treasury.

When the amendment of 1944 was under consideration, House Report 1210 (78th Congress, 2nd Session), recognized inferentially that there would be no increase in the amount of protection received by the Government:

> "By eliminating the requirement for renewal of bonds, the large amount of clerical and administrative work can be dispensed with and substantial savings in money and manpower will be effected. This will be accomplished without lessening in any appreciable degree the protection now afforded the Government."

The full authority granted to the administrative branch to determine the amount of bond penalties is an ample means of protecting the Government's interest. The Senate Committee on Naval Affairs reporting[4] on the same bill referred to the earlier amendment and the advice of the Postmaster General in 1927 to the effect that the supplying of a new bond every four years accomplished little or nothing in protecting the Government's financial interests, while on the other hand, the closing of the old account and the setting up of a new one in connection with the giving of the new bond represented a practice often difficult and frequently impossible of execution during war times. (See App. 23.)

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[3] The revised circular recited that operation under the statutory amendment had been difficult of execution and had led to inconvenience and added expense as a result of which the Treasury had determined that it would be to the best interest of the Government to revert to the former quadrennial method of bond renewal. As to the practice of the Treasury Department with regard to the statute prior to the 1944 amendment and the Regulations following it, see Treasury Circular 65, App. 25.

[4] Report No. 676—78th Congress, 2nd Session.

From 1928 until 1944 the other branches of the Government were still required to renew the bonds of their employees quadrennially just as they had since the enactment of the basic statute even though annual premiums were paid during such period in the same customary manner as they had been paid since 1894 when corporate sureties were first permitted to qualify by 6 U.S.C. 6. There is nowhere in the legislative history of the statute nor in administrative practice under it, any suggestion that the security required from postal employees during that period was to be different from or greater than that required from other Government employees. This is further confirmed by the fact that no change was made in the requirements with respect to personal sureties or the deposit of Government obligations as collateral.

From the foregoing it is at once apparent that the amendments of 1928 and 1944 did not intend to make any requirement for an increased coverage, but merely to obviate the mechanical step of renewing bonds every four years. The fact that the alternate methods of complying with the statute by giving personal surety or depositing Government bonds remained unchanged is clear evidence that the amount of coverage required was not to be increased. The action of the Treasury Department in declining to accept the practice authorized by the 1944 amendments and treating the earlier quadrennial renewal practice as its equivalent establishes clearly the administrative construction of the meaning of the statute by the department having principal charge of such matters and best qualified to determine proper practice in connection therewith.

The payment or non-payment of a premium by the principal to his surety does not affect the liability of the surety to the obligee named in the bond. The instant bond would have been no less effective if no reference to the premium had been made therein. The true significance of the premium reference is to be gleaned from the presumed purpose of 6 U.S.C. 14 and the final Instruction on the prescribed

bond form (R. 10). The decision of the court below holds that the payment of an annual premium causes an annual cumulation of liability under a statute which provides merely that an annual payment and acceptance shall be a compliance with a requirement for a quadrennial renewal.

The opinion of the dissenting judge in the court below (R. 41) is a clear and succinct statement of the law on the proposition that the surety's liability is limited to $2,000.00. It represents a reasonable construction of the terms of the bond.[5]

The opinion of the majority in the court below concedes that the amendment to the statute which authorized the Post Office Department to forego the quadrennial renewal of its employees bonds "should be considered limited to its stated purpose." Its stated purpose was to make "the payment and acceptance of the annual premiums on corporate surety bonds furnished by postal officers and employees . . . a compliance with the requirement for the renewal of such bonds within the meaning of sections 1 to 3 of this title."

There is nothing in the statute that can be construed as a requirement for the annual renewal of such bonds. It is true that the "officer whose duty it is to take and approve" such bonds may require them "to be renewed or strengthened" oftener than every four years, "if he deem such action necessary." There is nothing in the record to show the exercise of such discretionary power and it is not contended by the Government that any requirement for the renewal or strengthening of the bond was made.

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[5] It is noteworthy that no reported cases can be found holding the surety for cumulative liability on postal bonds or other federal official bonds, notwithstanding that corporate sureties have qualified on such bonds since 1894 and premiums have been paid annually on such bonds ever since. A letter from Chief Post Office Inspector James J. Doran published in the May 1948 issue of the Postmasters Gazette indicates that the theory now contended for by the Government in this case is a reversal of previous understanding of the meaning of the bond by the administrative staff of the Post Office itself. (See App. 35.)

Nevertheless the court below reached a result which entailed a potential liability ten times the penal sum which was named in the bond at the behest of the postal authorities.

CONCLUSION.

It is submitted that the plain terms of the bond create a liability on the part of the surety for no more than the penal sum named in the instrument, and that when the statute and the bond are read together, nothing can be found to justify holding that the surety's obligation was cumulative from year to year. It is urged that the writ be granted in order that a decision may be had as to the responsibility of the sureties on bonds such as these and in order that a guide be furnished for the administrative officers of the Government both in fixing penalties of new bonds and enforcing the Government's rights on subsisting bonds.

Respectfully,

ALEXANDER M. HERON,
Munsey Building,
Washington, D. C.

Attorney for The Association of Casualty and Surety Companies. Amicus Curiae.

APPENDIX.

39 U.S. C. 132:

Bonds of assistant postmasters and cashiers at first, second, and third class offices. Assistant postmasters and cashiers at first, second, and third class post offices, and when deemed necessary by the Postmaster General for the better protection of the interests of the Government any other employees in such offices, shall, before entering upon the duties of their office, give bond to the United States with good and approved security, and in such penalty as the Postmaster General shall prescribe, conditioned for the faithful discharge of all duties and trusts imposed upon them either by law or the rules and regulations of the Post Office Department. (June 13, 1898, c. 446, § 3, 30 Stat. 444).

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6 U.S.C. § 3:

Renewal: continuance of liability

Every officer whose duty it is to take and approve official bonds shall cause all such bonds to be renewed every four years after their date, but he may require such bonds to be renewed or strengthened oftener if he deem such action necessary. In the discretion of such officer the requirement of a new bond may be waived for the period of service of a bonded officer after the expiration of a four-year term of service pending the appointment and qualification of his successor. The nonperformance of any requirement of the provisions of sections 1 to 3 of this title, or of that part of section 27 of title 19 relating to transmitting copies of oaths to the Secretary of the Treasury, on the part of any official of the Government shall not be held to affect in any respect the liability of principal or sureties on any bond made or to be made to the United States. The liability of the principal and sureties on all official bonds shall continue and cover the period of service ensuing until the appointment and qualification of the successor of the principal. Nothing in said sections shall be construed to repeal or modify section 38 of title 39: *Provided*, That the payment and acceptance of the annual premium on corporate surety bonds furnished by postal officers and employees, officers and employees of other civilian agencies of the United States and bonded officers and enlisted men of the Army, Navy, Marine Corps, and Coast Guard shall be a compliance with the requirement for the renewal of such bonds within the meaning of sections 1 to 3 of this title. July 30, 1947, c. 390, § 1, 61 Stat. 646.

[No. 200]

HEARING ON S. 1647 TO AMEND THE ACT APPROVED MARCH 2, 1895, AS AMENDED

HOUSE OF REPRESENTATIVES,
COMMITTEE ON NAVAL AFFAIRS,

Washington, D. C., Friday, February 25, 1944.

The committee met at 10:30 a. m., Hon. Carl Vinson (chairman) presiding.

The CHAIRMAN. We will take up S. 1647.

(The bill referred to and the accompanying report are as follows:)

[S. 1647, 78th Cong., 2d sess.]

AN ACT To amend the Act approved March 2, 1895, as amended

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5 of the Act of Congress approved March 2, 1895 (28 Stat. 807), as amended by an Act approved March 8, 1928 (45 Stat. 247), is further amended by inserting in the third line of the proviso as it appears on page 247 of volume 45 of the United States Statutes at Large, after the word "employees" the following: "and bonded officers and enlisted men of the Army, Navy, Marine Corps, and Coast Guard."

Passed the Senate February 15 (legislative day, February 7), 1944.

Attest:

EDWIN A. HALSEY, *Secretary.*

[No. 174]

TO AMEND THE ACT APPROVED MARCH 2, 1895, AS AMENDED (H. R. 4030). MR. VINSON OF GEORGIA

NAVY DEPARTMENT,

Washington, January 14, 1944.

Hon. SAM RAYBURN,
Speaker of the House of Representatives.

MY DEAR MR. SPEAKER: There is transmitted herewith a draft of a proposed bill to amend the act approved March 2, 1895, as amended.

The purpose of the proposed bill is to amend the act approved March 2, 1895 (6 U.S.C. 3), as amended, so that it will provide that the payment and acceptance of the annual premiums on corporate surety bonds shall be a compliance with the requirement for renewal of such bonds of bonded officers and enlisted men of the Navy, Marine Corps, and Coast Guard. At present the law so provides as to postal officers and employees and the bill would extend the provision to cover bonded officers and enlisted men of the Navy, Marine Corps, and Coast Guard.

Under the act of March 2, 1895, every official charged with the approval of official bonds is required to cause all bonds under his cognizance to be renewed every 4 years or oftener if deemed necessary. Treasury Department Circular No. 197 issued December 1, 1898 (5 Comp. Dec. 988) requires that, upon the execution of a new bond, the bonded officer or man must close out his accounts under the old bond and deposit any unexpended balances before any advances are made under the new bond.

Literal compliance with these instructions in a number of cases is impossible and, with the approval of the Comptroller General, they have been modified to permit an officer to deposit funds needed for immediate use with some other proper disbursing officer, if it is not practicable to deposit any unexpended balances. When even this procedure is not feasible, officers outside the United States have retained their unexpended balances but have had such balances verified by two disinterested persons and have supported their accounts current under the old bonds with certificates signed by such persons.

To follow any of the above proceedings is impossible in many cases, particularly in time of war and the proposed bill, by eliminating the requirement for formal renewal of bonds every 4 years, would correct such situations.

The amendment to the act of March 2, 1895, by the act of March 8, 1928 (45 Stat. 247), was enacted apparently at the behest of the Post Office Department following the receipt by that Department of an opinion of the Comptroller General (7 Comp. Gen. 43) to the effect that annual payment of premiums on corporate surety bonds could not be construed as compliance with the provisions of the act of March 2, 1895, requiring renewal of such bonds every 4 years.

In urging a relaxation of the requirement for renewal of bonds, the Postmaster General in a letter to the Comptroller General dated June 16, 1927, invited attention to the large amount of effort and expense incident thereto and the fact that little or nothing was accomplished in protecting the Government's financial interests by having a new document executed every 4 years. These arguments would apply with equal or greater force to the situation now prevailing in the Navy.

The proposed legislation, if enacted into law, would involve no additional expense to the Government.

The Navy Department recommends enactment of the proposed legislation.

The Navy Department has been advised by the Bureau of the Budget that there would be no objection to the submission of the proposed legislation to the Congress.

Sincerely yours,

FRANK KNOX.

The CHAIRMAN. We have a letter from the Treasury Department on this bill that I have here.

Commander Brown, tell us what this bill is about.

STATEMENT OF COMMANDER PIERSON P. BROWN, BUREAU OF SUPPLIES AND ACCOUNTS, NAVY DEPARTMENT

Commander BROWN. I have a short statement here that I would like to present to the committee.

The CHAIRMAN. Will you read the letter from the Treasury Department, please?

Commander BROWN. Yes. I will make this statement and will then be in position to comment on that letter, Mr. Chairman. [Reading:]

Under the provisions of the act of March 2, 1895, every officer whose duty it is to take and approve official bonds shall cause all such bonds to be renewed every 4 years, but he may require bonds to be renewed or strengthened oftener if he deems such action necessary. Treasury Department regulations require that when a new bond is given, the disbursing officer close his accounts under the former bond and deposit any unexpended balances before an advance of funds is made under the new bond in order that the liability of the sureties on the respective bonds may be definitely fixed.

The requirement of depositing unexpended balances of funds upon renewal of bond has been modified from time to time with the approval of the Comptroller General. For example, if an officer is stationed remote from a United States depository, the transfer of funds to some other proper disbursing officer or agent is authorized. When it is not practicable for disbursing officers to deposit their official funds or to transfer unexpended balances to another disbursing officer, upon renewal of bond, it is required that at least two disinterested persons be designated to verify the cash on hand, such verification of cash to be made by actual count.

There are many instances, particularly in time of war, where disbursing officers are serving under conditions which make it impracticable to follow any of the procedures previously stated with respect to deposit, transfer, or verification of official funds upon renewal of bonds. By an amendment enacted March 8, 1928, it was provided that the payment and acceptance of the annual premium on corporate surety bonds furnished by postal officers and employees shall be a compliance with the requirement for the renewal of such bonds within the meaning of the act of March 2, 1895. The bill, S. 1647, would apply to bonded officers and enlisted men of the Navy, Marine Corps, and Coast Guard, the same procedure now provided by law for postal officers and employees, thus obviating the necessity for renewal of bonds each 4 years.

The CHAIRMAN. Now, suppose you read the letter from the Treasury Department.

Commander BROWN. This letter is from the Secretary of the Treasury addressed to the chairman of this committee. [Reading:]

There has come to the attention of this Department the fact that your committee has before it for consideration H. R. 4030, a bill to amend the act approved March 2, 1895, as amended.

The proposed bill as introduced at the request of the Navy Department would provide that the payment and acceptance of the annual premiums on corporate surety bonds would be a compliance with the requirement for the renewal of such bonds in the case of officers and enlisted men of the Navy, Marine Corps, and Coast Guard. This would have the effect of extending existing law now applicable to postal officers and employees to cover bonded

officers and enlisted men in the Naval Establishment, including the Marine Corps and Coast Guard. It is noted that the Senate passed the companion bill (S. 1647) on February 15, 1944, amended to include bonded officers and enlisted men of the Army.

The Treasury Department believes that such legislation should apply uniformly to the entire Federal service, and has, in the past, advocated the elimination of the mandatory requirement that official bonds be renewed every 4 years. Therefore, it is recommended that consideration be given H. R. 4030 with a view to broadening its provisions to include all bonded officers and employees of the States.

The suggested change could be accomplished by inserting wording in H. R. 4030 which would make that part of the bill after the word "following" read as follows: ", officers and employees of other civilian agencies of the United States and bonded officers and enlisted men of the Army, Navy, Marine Corps, and Coast Guard."

It is understood that the Comptroller General of the United States concurs in the recommendation that the benefits of this provision of law be extended to cover all bonded officers and employees of the United States.

Very truly yours,

D. W. BELL,
Acting Secretary of the Treasury.

The CHAIRMAN. Then the effect of this bill would be to do away with the requirements of the law which require the renewal of a bond every 4 years, and the winding up of the bonded officer's accounts, the accounting of his money, and the transfer of that to some agency or to some other place.

What you propose to do now is to post the premium on the bond and that keeps the officer still bonded?

Commander BROWN. That is correct, Mr. Chairman. The practical effect would be that when the officer goes to accountable duty and takes out a bond, he is required by law in the Navy to be bonded as long as he is on that accountable duty, whether it is 2 years or 6 years, and the original bond that he takes out when he goes on duty continues as long as he is on that duty, and he is required to make payment of the premium.

The CHAIRMAN. Who pays the premium of a paymaster, for instance?

Commander BROWN. He, himself, is required by law to pay it.

The CHAIRMAN. It comes out of his pocket?

Commander BROWN. Yes.

The CHAIRMAN. Is he reimbursed?

Commander BROWN. He is not reimbursed.

The CHAIRMAN. Then, a paymaster on a ship assigned to duty as a paymaster in charge of Government funds posts the bond, writes the bond, makes arrangements with the bonding and surety company, and he pays the premium out of his own pocket?

Commander BROWN. Yes, out of his own pocket. In fact, there is a statute which prohibits appropriated funds from being used for the payment of premiums on bonds in any case.

The CHAIRMAN. The Government, then, does not pay the premium on the bond?

Commander BROWN. Not in any case.

The CHAIRMAN. As a rule, what is the average bond of a paymaster on a ship?

Commander BROWN. It is a fixed amount of $10,000.

The CHAIRMAN. What is the premium on a $10,000 bond?

Commander BROWN. $10.

The CHAIRMAN. And he pays that?

Commander BROWN. Yes.

The CHAIRMAN. Under the law, at the end of 4 years, he has got to balance his books and have his accounts checked to see if the bonding company owes the Government anything.

Commander BROWN. That was the original theory.

The CHAIRMAN. Now, you propose to continue him under the bond by merely a continued payment of the premium.

Commander BROWN. A continued payment of the premium which would continue the old bond instead of the renewal.

The CHAIRMAN. That is right, and the Treasury Department and the Comptroller by that letter want it extended to all branches of the Government?

Commander BROWN. That is correct.

The CHAIRMAN. What are the views of the members of the committee?

Mr. JOHNSON of California. Is it not a good idea to check up on a man every 4 years and also the bonding company that writes the bond, to see if they are still solvent?

Commander BROWN. That, of course, is done automatically. When I am about to be bonded, I can select my own bonding company, but only those bonding companies that have been approved by the Treasury, and there are lists of those bonding companies kept up to date by the Department so it is known at all times which companies are solvent and the other companies will not be on the list.

Mr. JOHNSON of California. Does the Department keep checking those companies?

Commander BROWN. Oh, yes. That is done by the Treasury.

Mr. JOHNSON of California. If a bond is to continue for 10 years, will they check the company?

Commander BROWN. That is correct, sir.

The CHAIRMAN. Then the renewal of the premium does not cost as much as writing a new bond?

Commander BROWN. There is no difference in the cost to the individual officers.

The CHAIRMAN. Is it the same?

Commander BROWN. It is the same. Of course, there is the paper work involved.

The CHAIRMAN. What is the saving to the Government changing from the act of 1895 to your proposal? Is it merely the accounting and the balancing of the accounts of the officer?

Commander BROWN. On the very day that his bond expires he might be aboard a vessel and that vessel may be somewhere in action. In such case, it would be impossible for him to get two officers, line officers, to count all his cash for him so that he could renew his bond on that day.

The CHAIRMAN. The Treasury Department's proposal, in view of the Comptroller General's decision in the matter looks all right to me. I see no objection to it.

Commander BROWN. It is. They want it to cover all the Government employees; just what the Navy is advocating for its officers.

Mr. COLE. Is there any periodic auditing of the books and accounts of a bonded officer?

Commander BROWN. Oh, yes.

Mr. COLE. How frequently is that?

Commander BROWN. It is done in various ways. In the case of accountable officers of the Navy, we have our own inspectors. We have a general inspector of the Supply

Corps, an office created by statute, and they will make surprise inspections of the accounts of an officer.

Mr. COLE. How frequently do they do that on an average —once a year?

Commander BROWN. Well, it is very hard to say exactly how frequently they might inspect an individual officer.

Mr. COLE. It would certainly not be longer than at 4-year intervals.

Commander BROWN. Of course, everything in connection with any expenditures is subject to careful scrutiny in connection with the submission of all his returns to the Comptroller General, and then in addition to that, the Comptroller General has authority under law to send his inspectors to inspect accounts of any officer, any accountable officer in the Navy.

Mr. COLE. The only advantage I can see in requiring a renewal of the bond every 4 years is to establish a practice of a definite accounting of the man's work at periodic intervals. If that is done anyway, irrespective of the bond phase of it, I see no harm in removing the requirement of a 4-year renewal.

The CHAIRMAN. Commander Brown just developed an important fact there. You say that the Comptroller can have the accounts audited at any time, that the Comptroller can send his inspectors from his office to any bonded employee or officer of the Navy at any time?

Commander BROWN. Of the Government, Mr. Chairman.

The CHAIRMAN. In addition to that, you also have your own staff?

Commander BROWN. Yes.

The CHAIRMAN. Have you found many instances where there were errors or shortages in the accounts? How does that run?

Commander BROWN. Do you mean the extent of that in these times?

The CHAIRMAN. Yes.

Commander BROWN. I would say, Mr. Chairman, that considering the millions and millions of dollars that are expended now by our disbursing officers and the many people we have had to bring in to the corps, paymasters, those cases are remarkably small. Of course, now and then you do find some things.

The CHAIRMAN. And you will call on that officer to balance his own account out of his own fund?

Commander BROWN. Well, of course, that is a broad field. The matter would be thoroughly investigated and after it is determined that he is financially responsible, either he or the bonding company have to pay up.

The CHAIRMAN. Have there been any courts martial or prosecutions for embezzlement or misappropriation of funds on account of the great volume of business that is going on?

Commander BROWN. It has been remarkably small. There have been some, but very few.

The CHAIRMAN. It would be just like it would be in banks, or any place else?

Mr. HEIDINGER. If it developed that the shortages were not due to the fault of the officer, you would not require him to pay it then?

Commander BROWN. No, sir. That is what I meant before—even before it is decided whether it is a question for a court martial, the matter is thoroughly investigated by a board.

The CHAIRMAN. Say, for example, that the paymaster is on a ship and the ship goes down and all his records are lost. How do you reestablish those records, and what do you do?

Commander BROWN. There are two questions involved in that. Of course, the most important one is the financial responsibility of the officer. We have statutory authority under which he may be relieved in such a case. As to how we establish the amounts involved, there are two things, of course. We have the one case where the records and the money goes to the bottom of the ocean, but the officer is saved. There are other cases where the officer is lost also.

The CHAIRMAN. Take the case where the money and the records go to the bottom of the ocean and the officer is saved. What do you do in cases of that kind? Do you just wipe it off and go on and start all over again?

Commander BROWN. In effect, it is wiped out. Naturally, under the act of July 1919 that would happen. In order to establish how much was involved, his whole accounts are recomputed by an office that we have for that very purpose. We have all his previous returns which are considered, and on the basis of his previous vouchers and returns, taking into consideration how much money has been placed to his credit by the Treasury, we reconstruct his

accounts, make a report of the reconstructed account to the Secretary of the Navy and the Paymaster General of the Navy recommends that he be relieved of any accountability, setting forth all the circumstances of record, together with his reconstructed account.

The CHAIRMAN. You start him all over again?

Commander BROWN. Yes.

The CHAIRMAN. What is the pleasure of the committee with reference to adopting the amendment suggested by the Treasury Department?

Mr. COLE. Why not have the Judge Advocate draft a proper bill so that the entire proviso, as amended in accordance with the recommendations of the committee, will appear in the bill itself, because I am sure we will encounter some criticism from the Members on the floor.

The CHAIRMAN. Without objection, we will let the Judge Advocate General do that. The bill will be favorably reported, and I will ask Mr. Grant to report the bill.

Calendar No. 690

78TH CONGRESS
2d Session

REPORT
No. 676

SENATE

AMENDING THE ACT APPROVED MARCH 2, 1895, AS AMENDED

FEBRUARY 3 (legislative day, JANUARY 24), 1944.—Ordered to be printed

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Mr. WALSH of Massachusetts, from the Committee on Naval Affairs, submitted the following

REPORT

[To accompany S. 1647]

The Committee on Naval Affairs, to whom was referred the bill (S. 1647) to amend the act approved March 2, 1895, as amended, having considered the same, report favorably thereon with an amendment, and recommend that the bill do pass.

The purpose of the bill is to amend the act approved March 2, 1895 (6 U.S.C. 3) as amended, so that it will provide that the payment and acceptance of the annual premiums on corporate surety bonds shall be a compliance with the requirement for renewal of such bonds of bonded

officers and enlisted men of the Army, Navy, Marine Corps, and Coast Guard. At present the law so provides as to postal officers and employees and the bill would extend the provision to cover bonded officers and enlisted men of the Army, Navy, Marine Corps, and Coast Guard.

Under the act of March 2, 1895, every official charged with the approval of official bonds is required to cause all bonds under his cognizance to be renewed every 4 years or oftener if deemed necessary. Treasury Department Circular No. 197, issued December 1, 1898 (5 Comp. Dec. 988), requires that, upon the execution of a new bond, the bonded officer or man must close out his accounts under the old bond and deposit any unexpended balances before any advances are made under the new bond.

Literal compliance with these instructions in a number of cases is impossible and, with the approval of the Comptroller General, they have been modified to permit an officer to deposit funds needed for immediate use with some other proper disbursing officer, if it is not practicable to deposit any unexpended balances. When even this procedure is not feasible, officers outside the United States have retained their unexpended balances but have had such balances verified by two disinterested persons and have supported their accounts current under the old bonds with certificates signed by such persons.

To follow any of the above procedures is impossible in many cases, particularly in time of war, and the bill, by eliminating the requirement for formal renewal of bonds every 4 years, would correct such situations.

The amendment to the act of March 2, 1895, by the act of March 8, 1928 (45 Stat. 247) was enacted, apparently at the behest of the Post Office Department following the receipt by that Department of an opinion of the Comptroller General (7 Comp. Gen. 43) to the effect that annual payment of premiums on corporate surety bonds could not be construed as compliance with the provisions of the act of March 2, 1895, requiring renewal of such bonds every 4 years.

In urging a relaxation of the requirement for renewal of bonds, the Postmaster General in a letter to the Comptroller General dated June 16, 1927, invited attention to the large amount of effort and expense incident thereto and the fact that little or nothing was accomplished in

protecting the Government's financial interests by having a new document executed every 4 years. These arguments would apply with equal or greater force to the situation now prevailing in the Army and Navy.

The bill, if enacted into law, would involve no additional expense to the Government.

The bill was introduced at the request of the Navy Department.

At the request of the War Department, the bill was amended by the committee to include the Army.

The bill meets with the approval of the Comptroller General, and has been cleared by the Bureau of the Budget.

OFFICIAL BONDS—PREPARATION, SURETIES, RENEWAL, NOTICES OF APPROVAL, ADVANCES, ETC.

1905
Department Circular No. 65.

Division of Appointments.

TREASURY DEPARTMENT,
Office of the Secretary,
Washington, May 29, 1905.

To Principal Officers in and Under the Treasury Department:

Upon the appointment of an officer required to give bond which is to be approved by the Secretary of the Treasury, the necessary form will be prepared in this office (Division of Appointments) and forwarded to him for execution, but in no case, except by express order of the Secretary, shall *blank* bonds be furnished to any person, and no bonds prepared elsewhere or executed in nonconformity with the requirements of this office will be accepted.

A duly qualified corporate surety company is preferred by the Department as surety, but two or more individuals, able to justify in unencumbered real estate to the amount of double the penalty of the bond, may be accepted.

Individual sureties are required by law to furnish every two years, and as much oftener as the Secretary of the Treasury may require, satisfactory evidence of their con-

tinued solvency, duly certified by the proper officer of the court.

Each form of bond sent to an officer for execution will be accompanied by a list of the corporate surety companies which have complied with the provisions of the act of Congress approved August 13, 1894 (ch. 282, Sec. I; 28 Stat., 279), and which are authorized to execute, as *sole* surety, any recognizance, stipulation, bond, or undertaking in which the United States is interested.

The list will show the qualification of the respective companies in the several judicial districts, as indicated by powers of attorney filed in this Department. They are authorized to do business *only* in the jurisdictions wherein they have appointed proper representatives as required by law. Their acceptability is further subject to a literal compliance with the rules and regulations of the Department governing the form and execution of bonds, contracts, etc.

Official bonds are required by law to be renewed every four years. Renewal at more frequent intervals for the purpose of substituting one corporate company for another will not be permitted.

Officers having a corporate company as surety on their bonds are required to forward to the Department the company's receipts for the payment of annual premiums.

Notice of the date, amount, and approval of bonds will be promptly furnished to all officers interested therein, and no advance of money shall be made to a bonded officer until such notice has been received from this office.

Advances of funds shall not be made to bonded disbursing officers in excess of the penalties of their bonds, except upon the written authority of the Secretary. Whenever such advances are required by the demands of public business, a written statement of the necessity therefor must be submitted to this Department for consideration by the Secretary before the said authority will be given. This regulation is not to be construed as requiring additional authority for advances in excess of the penalties of bonds in cases where general authority therefor has already been given.

LESLIE M. SHAW,
Secretary.

ACCEPTANCE OF BONDS, NOTES OR OTHER OBLIGATIONS ISSUED OR GUARANTEED BY THE UNITED STATES AS SECURITY IN LIEU OF SURETY OR SURETIES ON PENAL BONDS

1934
Department Circular No. 154 [1]
(Revised)

Commissioner of Accounts
and Deposits

TREASURY DEPARTMENT,
Office of the Secretary,
Washington, February 6, 1935.

To Bond-Approving Officers, the Treasurer of the United States, Federal Reserve Banks, and Others Concerned:

Treasury Department Circular No. 154 (revised), dated April 30, 1926, is hereby amended and supplemented so as to read as follows:

The following rules and regulations are prescribed for carrying into effect section 1126 of the Revenue Act of 1926, approved February 26, 1926, as amended by the act of February 4, 1935, which provides as follows:

* * * * * * * * * *

I. BOND-APPROVING OFFICERS

1. The term "bond-approving officers" as used in this circular means the head of an executive department or Government establishment or an officer designated either by law or regulation to approve "penal bonds." The Treasury of the United States assumes no responsibility or liability on account of the acts of bond-approving officers. The term "bond-approving officer" shall be deemed to include the officer's successors in office.

II. ACCEPTANCE OF BONDS OR NOTES BY BOND-APPROVING OFFICERS

2. Any individual, partnership, or corporation required by the laws of the United States or regulations made pursuant thereto to furnish any recognizance, stipulation, bond, guaranty, or undertaking (hereinafter called penal bond), with surety or sureties, may, in lieu of such surety or sureties, deposit as security with the official having au-

thority to approve such penal bond (hereinafter called the bond-approving officer), United States bonds, Treasury notes, or other public debt obligations of the United States, or obligations which are unconditionally guaranteed as to both interest and principal by the United States (all of which classes of obligations are hereinafter called "bonds or notes"), in a sum equal at their par value to the amount of the penal bond required to be furnished, together with an irrevocable power of attorney and agreement in the form hereinafter prescribed, authorizing the bond-approving officer to collect or sell, assign and transfer such bonds or notes so deposited in case of any default in the performance of any of the conditions or stipulations of such penal bond. The acceptance of such bonds or notes in lieu of surety or sureties required by law shall have the same force and effect as individual or corporate sureties, or certified checks, bank drafts, postoffice money orders, or cash, for the penalty or amount of such penal bond. The term "par value" as applied in this circular to bonds or notes not issued on a discount basis means the stated dollar amount thereof; i. e., the denominational amount, such as $100, $500, and $1,000; and as applied to bonds or notes issued on a discount basis means the dollar amount which the holder is entitled to receive at maturity or the next following date of redemption at the option of the holder, whichever amount is less. In order to avoid the frequent substitution of bonds or notes, bond-approving officers will not receive a bond or note which matures or, at the option of the holder, may be redeemed within 30 days of the date of deposit; and any bond-approving officer may refuse to receive bonds or notes which mature or, at the option of the holder, may be redeemed within a year of the date of deposit, in cases where he rules that deposit of such bonds or notes might lead to frequent substitutions.

3. The individual, partnership, or corporation required to furnish any penal bond, who deposits bonds or notes as security in lieu of surety or sureties in accordance with the provisions of this circular, must be the owner of the bonds or notes deposited, and is hereinafter called the obligor. Bonds or notes may be deposited with bond-approving officers pursuant to the provisions of this circular in either coupon or registered form. Coupon bonds or notes shall have attached thereto all coupons unmatured at the date of

such deposit, and all matured coupons should be detached. Registered bonds or notes must be registered in the name of the obligor. They need not be assigned, and must not be assigned to the bond-approving officer. Bonds registered in the name of the obligor may, however, bear assignment in blank or to the Secretary of the Treasury for exchange for coupon bonds.

4. The bonds or notes to be deposited must in every case be delivered to the bond-approving officer at the obligor's risk and expense. Coupon bonds or notes and registered bonds or notes assigned in blank or for exchange for coupon bonds or notes cannot safely be forwarded by registered mail unless insured by the obligor against risk of loss in transit. Registered bonds or notes, unless assigned in blank or for exchange for coupon bonds or notes, need not be so insured when forwarded by registered mail, unless the obligor so elects. The bond-approving officer shall issue a receipt in duplicate, substantially in form A, hereto attached, for the bonds or notes so deposited, the original of the receipt to be given to the obligor and the duplicate to be retained by the bond-approving officer for his files.

5. At the time of the deposit of any bonds or notes with a bond-approving officer in accordance with the provisions of this circular, the obligor shall deliver to the bond-approving officer a duly executed power of attorney and agreement, in favor of the bond-approving officer, authorizing such officer to collect or sell, assign, and transfer, such bonds or notes so deposited in case of any default in the performance of any of the conditions or stipulations of the penal bond, and to apply the proceeds of such sale or collection, in whole or in part, to the satisfaction of any damages, demands, or deficiency arising by reason of such default. The power of attorney and agreements shall not be revocable by the obligor; and, in the case of an individual, shall be substantially in form C, hereto attached; in the case of a partnership, substantially in form D, hereto attached; and in the case of a corporation, substantially in form E, hereto attached.

6. In connection with the acceptance of bonds or notes hereunder as security in lieu of surety or sureties, bond-approving officers must satisfy themselves as to the ownership of the bonds or notes deposited and the sufficiency of the power of attorney and agreement, and in the case of

registered bonds or notes, as to the regularity of the assignments as well, and, in general, that the deposit is made in conformity with the provisions of this circular.

7. Any obligor who deposits bonds or notes in accordance with the provisions of this circular may, upon written application to and with the approval of the bond-approving officer, substitute for the bonds or notes to deposited (*a*) other bonds or notes in a sum equal at their par value to not less than the par amount of the bonds or notes to be withdrawn upon compliance with all the provisions of this circular applicable to an original deposit of bonds or notes in lieu of surety or sureties, or (*b*) a penal bond with surety or sureties or such other security as may be allowed by law. The bonds or notes withdrawn shall be returned in the manner hereinafter provided for the return of bonds and notes deposited.

III. Deposits of Bonds or Notes by Bond-Approving Officers with Depositaries

* * * * * * * * * *

12. As soon as security for the performance of the penal bond is no longer necessary, the bonds or notes deposited in lieu of surety or sureties on such penal bond, together with the power of attorney and agreement accompanying such bonds or notes, shall be returned to the obligor by the bond-approving officer, without application therefor from the obligor. The determination of the question whether security is any longer necessary for the performance of the penal bond shall rest with the bond-approving officer and such other officers as shall have jurisdiction in the premises under the provisions of law and administrative regulations which may be applicable; provided, however, that in case a person or persons supplying labor or material as provided by the Act of Congress, approved February 24, 1905 (33 Stat. 811), entitled "An Act to amend an Act approved August 13, 1894, entitled 'An Act for the protection of persons furnishing materials and labor for the construction of public works,' " shall file with the obligee, at any time after a default in the performance of any contract subject to said acts, the application and affidavit therein provided, neither the obligee nor the bond-approving officer shall deliver to the obligor the deposited bonds or notes or any surplus proceeds thereof until the expiration of the time limited

by said acts for the institution of suit by such person or persons (viz, 1 year from the date of final settlement of the contract for the performance of which the bonds or notes were pledged), and, in case suit shall be instituted within such time, shall hold said bonds or notes or proceeds subject to the order of the court having jurisdiction thereof; provided, further, that nothing herein contained shall affect or impair the priority of the claim of the United States against the bonds or notes deposited or any right or remedy granted by said acts or under this circular to the United States for default upon any obligation of said penal bond.

* * * * * * * * * *

V. Form of Penal Bonds With Bonds or Notes as Security

16. Penal bonds on which bonds or notes are accepted as security in lieu of surety or sureties may be substantially in form F, hereto attached. Administrative offices of the Government may, however, use other forms of penal bonds appropriate to the work of their respective offices, provided that upon the execution of the penal bond the principal shall indorse on the face thereof and sign the following statement:

The securities described in the annexed schedule are hereby pledged as security for the performance and fulfillment of the foregoing undertaking in accordance with section 1126 of the Revenue Act of 1926, as amended, and Treasury Department Circular No. 154, dated February 6, 1935.

.....

Principal on the above bond.

17. Nothing contained in this circular shall be construed as modifying the existing practice or duties of administrative offices in handling penal bonds, except to the extent made necessary under the terms of this circular, by reason of the acceptance of bonds or notes as security in lieu of surety or sureties thereon.

VI. Special Provisions

* * * * * * * * * *

20. *Other departments and establishments.*—Bond-approving officers of other departments and establishments of

the Government accepting bonds or notes in lieu of surety or sureties under the provisions of section 1126 of the Revenue Act of 1926, as amended, shall be governed by the provisions of this circular. This circular may be modified or amended only upon the approval of the Secretary of the Treasury.

FORM F

FORM OF PENAL BOND FOR EXECUTION BY INDIVIDUALS, PARTNERSHIPS, OR CORPORATIONS WHERE ELIGIBLE SECURITIES ARE ACCEPTED AS SECURITY IN LIEU OF SURETY OR SURETIES.

Know all men by these presents, that ...., ..., of the city of ....., and State of ....., as obligor, ... held and firmly bound unto the United States of America, in the penal sum of ..... dollars ($.....), lawful money of the United States, for the payment of which sum, well and truly to be made to the United States, without relief from valuation or appraisement laws, ... bind ....., ... heirs, executors, administrators, successors, and assigns, firmly by these presents.

The condition of the above obligation is such that ..... (Insert conditions and stipulations appropriate to the penal bond)

The above-bounded obligor, in order the more fully to secure the United States in the payment of the aforementioned sum, hereby pledges as security therefor, in accordance with the provisions of section 1126 of the Revenue Act of 1926, as amended, securities in the principal sum of ..... dollars ($.....), which said securities are numbered serially, are in the denominations and amounts, and are otherwise more particularly described as follows:

. . . .

. . . .

. . . .

which said securities have this day been deposited with ..... and his
(Name and official title of bond-approving officer)
receipt taken therefor.

Contemporaneously herewith the undersigned has also executed and delivered an irrevocable power of attorney and agreement in favor of .....,
(Name and official title of bond-approving officer)
authorizing and empowering said officer as such attorney to collect or sell the above-described securities so deposited, or any part thereof, in case of any default in the performance of any of the above-named conditions or stipulations.

In witness whereof, this bond has been signed, sealed, and delivered by the above-named obligor, this ..... day of ....., 19.....

..... [SEAL.]

..... [SEAL.]

Signed, sealed, and delivered in the presence of:

.....
(Name)

.....
(Address)

.....
(Name)

.....
(Address)

REGULATIONS WITH RESPECT TO THE RENEWAL OF BONDS APPROVED BY THE SECRETARY OF THE TREASURY. .

1946
Department Circular No. 745 Revised
Fiscal Service
Bureau of Accounts

March 18, 1946
Treasury Department
Office of the Secretary
Washington, D. C.

To Heads of Executive Departments, Establishments, and Agencies, and Others Concerned:

Department Circular No. 745, dated July 10, 1944, requires that every officer and employee from whom a corporate surety bond is received and approved by the Secretary of the Treasury shall furnish a receipt showing payment of the premium for each year during which he continues to operate under such bond.

Actual operation of the premium receipt procedure for nearly two years has demonstrated that it is difficult to secure properly executed receipts in many cases. This has led to inconvenience and added expense, and the Treasury has, accordingly, determined that it would be to the best interest of the Government to revert to the former bond renewal plan.

Therefore, Department Circular No. 745, dated July 10, 1944, is hereby revised to read as follows:

> Effective April 1, 1946, every officer and employee who has given or thereafter gives an official bond which is required to be furnished to and approved by the Secretary of the Treasury, shall every four years after the date of such bond furnish a new bond, but the Secretary of the Treasury may require any such bond to be renewed or strengthened oftener if he deems such action necessary. Renewals of existing bonds shall be effected as follows:
>
> (a) Bonds which are less than four years old on April 1, 1946, shall be renewed on the first 4-year anniversary date of the bond. Pending renewal,

premium receipts will not be required to be submitted to the Treasury Department.

(b) Bonds which are four years old on April 1, 1946, shall be renewed as soon as possible, effective April 1, 1946.

(c) Bonds which are more than four years old on April 1, 1946, shall be renewed on the next premium anniversary date of the bond.

Original and renewal bonds shall be forwarded through the usual departmental or agency channels to the Section of Surety Bonds, Bureau of Accounts, Treasury Department. Renewal bonds must be forwarded promptly.

O. MAX GARDNER
Acting Secretary of the Treasury

Postmaster's Gazette
May, 1948.

BROADER PROTECTION GIVEN POSTMASTERS BY INSPECTION SERVICE BOND INTERPRETATION.

The unsolicited letter below from Chief Post Office Inspector James J. Doran is greatly appreciated, indicating as it does a desire on the part of that important branch of the postal service to be helpful to postmasters in handling claims for shortage in such a manner, if possible, as to relieve postmasters of liability in cases where they are not directly responsible. Mr. Doran's letter follows:

POST OFFICE DEPARTMENT

Chief Post Office Inspector

Washington 25, D. C.

Mr. Dan Gibson
Postmaster
Albany, Georgia

March 15, 1948

Dear Dan:

* * * * * * * * * * *

The Inspection Service has never been satisfied to collect monies from postmasters in order to bring certain of their

accounts into balance when the cause of such shortages was the result of embezzlement by some person other than the postmaster. Particularly have we been concerned with situations where the bond of a defaulting supervisor or employee was not considered sufficient in amount to cover the entire sum of the defalcation. For a long time this Service has been studying the matter, and after a thorough analysis of the contents and nature of the surety bonds, we arrived at the decision that the payment of an annual premium made the bond a new bond each year. In other words, if a defaulting person employed by the Postal Service had furnished a surety bond for $10,000 and had paid annual premiums on it for four years, we construed that to mean that he had furnished a bond to the Post Office Department that would cover defalcations up to $40,000, providing not more than the penalty of the bond, $10,000, had been embezzled in any one year. The bond, in our opinion, increased by the amount for which it was written each year, providing a premium had been asked for by the surety company and had been paid to such company.

A particular case in point was that of an employee whose bond was $2,000 and who had embezzled funds to the extent of more than $7,500 over a period of years. That particular clerk, after his defalcations were found by inspectors, repaid certain sums over a period of time, leaving a balance due the Department of more than $3,800. The surety company that had furnished bond for the defaulting employee indicated a desire to pay us $2,000, which that company represented was the total of their liability. This we declined to accept, maintaining that the bond was for $2,000 for each year it was in existence, providing, of course, that the annual premiums had been paid.

We asked the Solicitor for the Post Office Department for an opinion, setting forth the evidence as contained in the bond and our reasons why it should be construed as having an accumulative responsibility. The Solicitor, after considerable study, agreed with our views, and later the Department of Justice gave us an opinion that we were on the right track. The Department of Justice later ordered a suit to be filed—not for the $2,000 but for the total amount still due the Department, a sum of over $3,800. The suit came to trial a short while ago and the Court, after hearing the evidence, rendered a decision along the lines set forth in this communication. A judgment for the full amount of the balance due, plus interest, was ordered paid by the de-

fendant, which in this particular instance was the surety company that had furnished the bond.

Of course we are looking forward to seeing this judgment appealed by the surety company, and there is every reason to believe that the case may go in time to the Supreme Court of the United States. Naturally we hope for an affirmation of the decision of the lower Court.

We realize that this is a long step from the previous opinion held that the penalty of the bond was the total amount for which the surety company was responsible. We have one case pending at the present time which we hope will be set for trial in the near future where the defaulting employee, a supervisor, furnished bond to the extent of $22,000, which amount the surety company is quite willing to pay. We have prorated the embezzlements, and in only one year did the employee embezzle more than the amount of the bond in effect for that year. Instead of making a demand on the surety company or asking the Department of Justice to institute a suit for the $22,000, we have made a demand of more than $75,000 and have asked the Department of Justice to enter suit for that amount. The case is already on the calendar and, as I have said before, we hope will soon reach the trial stage.

In the event we should be successful in this case or there is a reversal in the previous case in the higher courts, we hope all of it will lead to a very thorough study of the necessity for getting the type and kind of surety bonds that will protect the Post Office Department to the fullest possible extent consistent with fair payment to the surety companies.

* * * * * * * * * *

I am sure you will realize by the recital of the facts herein that this is a matter which has not received light or passing attention by this Service. For years we have been interested in it, but the time was not opportune until within the past two years for a definite attitude upon what the surety companies considered their responsibility. This is the kind of work that the Inspection Service, in the opinion of the writer, was established to do. This is the kind of work we hope to continue to do.

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With best wishes, I am

Sincerely yours,

J. J. DORAN,
Chief Inspector.